Supreme Court of the United States

OCTOBER TERM, 1966

No. 53

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

C & C PLYWOOD CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[fol. A]

BEFORE THE NATIONAL LABOR RELATIONS BOARD
NINETEENTH REGION

Case No. 19-CA-2686

C & C PLYWOOD CORPORATION

and

PLYWOOD, LUMBER AND SAWMILL WORKERS LOCAL UNION No. 2405, AFL-CIO

COMPLAINT AND NOTICE OF HEARING—
Dated Sept. 18, 1963

It having been charged by Plywood, Lumber and Sawmill Workers Local Union No. 2405, AFL-CIO (herein called the Union) that C & C Plywood Corporation (herein called Respondent) has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of said Board, by the undersigned Regional Director for the Nineteenth Region, acting pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of hearing and alleges as follows:

1. The charge herein was filed on August 31, 1963, and a copy thereof was served by registered mail upon Respondent on or about the same date.

2. Respondent is now, and has been at all times material herein, an Oregon corporation, with its principal place of business located in Kalispell, Montana, where it is engaged in the business of processing and manufacturing plywood from green veneer.

During the past 12 months, Respondent purchased from points outside the State of Montana goods valued in excess of $50,000 and sold plywood valued in excess of

$50,000 to purchasers located at points outside the State of Montana.

3. Respondent, at all times material herein, has been an Employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[fol. B] 4. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5. The following unit is now, and at all times herein alleged, has been a unit of employees of Respondent appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees of the Employer at its veneer and plywood plants near Kalispell, Montana, excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

6. Since on or about August 28, 1962, and at all times material herein, the Union has been the certified representative for purposes of collective bargaining in the appropriate unit set forth in paragraph 5, above, and by virtue of Section 9(a) of the Act, has been and now is the exclusive representative of all employees in said unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

7. From September 1962 until May 1, 1963, the Union and Respondent engaged in approximately 15 bargaining sessions which culminated in a signed collective-bargaining agreement, effective May 1, 1963, and expiring October 31, 1968.

8. Since on or about May 20, 1963, without consulting the Union, Respondent unilaterally, and over the objection of said Union, instituted a group wage incentive plan covering approximately one-fourth of the employees in the appropriate unit.

9. Since on or about May 20, 1963, and at all times thereafter, Respondent has refused upon demand made by the union, and continues to refuse to bargain collectively with the Union over the group wage incentive plan.

10. By the acts of Respondent as described in paragraphs 8 and 9 above, Respondent interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, and by said acts Respondent has engaged in, and is now engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

[fol. C] 11. By refusing to bargain with the Union, as set forth and described in paragraphs 8 and 9 above, as the representative of its employees in the appropriate unit, Respondent has engaged in, and is now engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

12. The acts of Respondent, as set forth and described in paragraphs 8 and 9 above, occurring in connection with the operations of Respondent as described in paragraph 2 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States and lead to and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and constitute unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 16th day of October, 1963, at 10:00 a.m. (MST) in the Council Chamber of the City Hall in Kalispell, Montana, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the Board, an original and four copies of an answer to this Complaint within 10 days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at Seattle, Washington, this 18th day of September, 1968.

/s/ Thomas P. Graham, Jr.
Regional Director

National Labor Relations Board, Region 19
327 Logan Building, Seattle, Wash. 98101

[fol. D]

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
NINETEENTH REGION

Case No. 19-CA-2686

[Title Omitted]

ANSWER

Comes now the Employer herein and for Answer to the Compaint issued by the Regional Director for the Nineteenth Region of the National Labor Relations Board under date of September 18, 1968, avers and alleges as follows:

I

A charge bearing this Case Number was received in the United States Mail by the Employer shortly after August 1, 1968, which indicates the charge was filed with the National Labor Relations Board on July 31, 1968. Except as admitted herein, the Employer denies each, every and all of the allegations of paragraph 1. of the Complaint.

II

The Employer herein admits paragraphs numbered 2., 3., 4., 5., and 6. of the Complaint.

III

The Employer herein admits paragraph numbered 7. of the Complaint except that eleven (11), instead of fifteen (15) bargaining sessions were held in the period alleged. A complete agreement governing rates of pay, wages, hours of employment, and other conditions of employment was concluded, reduced to writing, and signed by representatives of the Employer and Union under date of May 1, 1963.

IV

On May 20, 1963, the Employer herein, pursuant to the provisions of the collective bargaining agreement, executed under date of May 1, 1963, posted a notice a copy of [fol. E] which is attached hereto and marked as Employer's Exhibit No. 1 and made a part hereof as if fully set out hereat. Thereafter, and on June 7, 1963, and July 15, 1963, the Employer met with representatives of the Union and fully discussed and negotiated with the Union herein involved in good faith regarding the notice herein referred to and its contents. Except as herein stated, the Employer denies each, every and all of the allegations of paragraphs number 8., 9., 10., 11., and 12. of the Complaint.

WHEREFORE, the Employer herein respectfully prays that the Complaint herein be dismissed and the Employer awarded its costs, disbursements, and attorney's fees herein.

/s/ George J. Tichy
GEORGE J. TICHY
Attorney for Employer

Address and Telephone Number:
West 721 Second Avenue
Spokane, Washington 99204
Telephone: Area Code 509
MAdison 4-2258

[Duly Sworn to by Clay Thomason
Jurat Omitted in Printing]

[fol. F]

EXHIBIT NO. 1 TO ANSWER

C & C PLYWOOD CORP.

May 20, 1963

GLUE SPREADER CREW PREMIUM PAY

This premium pay schedule will be tried for the next couple of months to determine how it will work for all concerned.

Core feeders, core layers, and sheet turners only will benefit from this premium pay.

The conditions are, as follows:

(1) The footage will be computed on a pay-period time basis (every two weeks).

(2) Every member of the spreader crew will receive $2.50 per hour if footage is achieved.

(3) This rate will apply to over-time also, but only to the time worked on the spreader.

(4) The cold press spreaders must average 7,500′ core-line basis per hour.

(5) Hot press three-man crew must average 3,750′ core-line basis per hour.

(6) Smoke-times must be considered as time worked.

(7) Rejects must remain at 5% or less for the period.

(8) The Company will do everything possible to assist the crews in obtaining this footage by dividing the stock as evenly as possible, however, the foremen will make all stock decisions.

(9) A complete report of the footage averages and reject percentages will be posted at the end of the payroll period.

[fol. 1]

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Nineteenth Region

Case No. 19-CA-2686

In the Matter of:

C & C PLYWOOD CORPORATION

and

PLYWOOD, LUMBER AND SAWMILL WORKERS LOCAL UNION No. 2405, AFL-CIO

EXCERPTS FROM TRANSCRIPT OF TESTIMONY BEFORE TRIAL EXAMINER—OCT. 16, 1963

Room 205,
Flat Head County Court House,
Kalispell, Montana

The above-entitled matter came on for hearing, pursuant to notice, at 2 o'clock, p.m.

BEFORE:

MAURICE M. MILLER, Trial Examiner.

APPEARANCES:

ROBERT F. STANGE
327 Logan Building, Seattle, Washington, appearing as counsel for General Counsel.

ROBERT C. WELLER
P.O. Box 201, Kalispell, Montana, appearing on behalf of Plywood, Lumber and Sawmill Workers Local Union No. 2405, the Union.

GEORGE J. TICHY
West 721 Second Avenue, Spokane, Washington, 99204, appearing on behalf of C & C Plywood Corporation, the Employer.

[fol. 7] * * * *

TRIAL EXAMINER:

Are you ready to proceed on behalf of the General Counsel?

MR. STANGE: Yes, Mr. Examiner.

Before we proceed further, I would like to move the Examiner for permission to amend the complaint in Paragraph 1 to correct a typographical error to show the date in the first sentence of Paragraph 1 as July 31, 1963, in place of August 31, 1963, and then in Paragraph No. 7 to change the second sentence by deleting the word "approximately" and the number 15 and inserting for these two deletions the number 11.

MR. TICHY: The Employer has no objection * * *

[fol. 9] * * * *

MR. STANGE: General Counsel calls Robert Weller.

* * * *

DIRECT EXAMINATION

Q. (By Mr. Stange) Mr. Weller, will you state your name and address?

A. Robert C. Weller, Box 201, Kalispell, Montana.

Q. What is your occupation?

A. Executive secretary of the Montana District Council Lumber and Saw Mill Workers.

Q. How long have you been in that position?

A. Twenty years.

Q. Now, calling your attention to approximately May 1 of 1963, did you enter into a collective bargaining agreement with C & C Plywood Corporation?

A. Yes.

Q. Had there been a history of bargaining with the corporation?

A. Yes.

Q. And over what period of time did that occur?

[fol. 10] A. First bargaining session, I believe, was on October 2, 1962.

Q. And was the union, the local union No. 2405, a certified bargaining agent?

A. It was.

* * * *

[fol. 11] * * * *

Q. (By Mr. Stange) Now, calling your attention to the week beginning May 19, 1963, were you informed that the Employer C & C Plywood Corporation had instituted an incentive wage plan?

A. Yes, I was.

Q. And do you recall what date you were informed of this?

A. No, I don't. It was during that week, middle or latter part of that week.

Q. And how did this matter come to your attention?

A. One of the members employed there brought a copy of the notice and it was posted on the bulletin board.

* * * *

Q. (By Mr. Stange) I hand you what has been marked as General Counsel's Exhibit 3 for identification and ask you what that is?

A. This is a copy of the notice that was posted on the bulletin board and later brought into my office.

Q. And this is, in fact, the glue spreader crew premium pay plan the Company instituted?

A. It is.

[fol. 12] * * * *

Q. (By Mr. Stange) Prior to this General Counsel's 3 having been brought to your attention, had you and C & C Plywood discussed a premium pay plan?

A. No, not specifically. It was quite sometime prior to the time the agreement was signed. The point was raised in a bargaining session but not very seriously.

Q. This was prior to the execution of the collective bargaining agreement?

A. Yes, quite sometime prior.

Q. And how was this presented by the company, if it was?

A. It wasn't actually presented in a general discussion. I think reference was made to the fact that the J. Neils Lumber Company had proposed an incentive bonus system in its plywood department which the union had resisted and the Company had withdrawn.

Q. What was your position in negotiations as the union's position in the negotiations with regard to this gen-

[fol. 13] eral discussion on the premium pay plan?

A. I think we made it clear we wouldn't agree to such a plan.

Q. Now, after this premium pay plan or incentive pay plan was brought to your attention by a member of your union, what action, if any, did you take?

A. I wrote the Company a letter and requested a meeting with them to discuss that.

* * * *

Q. (By Mr. Stange) As a result of your letter of May 27, 1963, requesting a meeting what, if anything, occurred after this letter?

A. We received a reply from the company suggesting [fol. 14] a date for the meeting.

* * * *

Q. (By Mr. Stange) Was there in fact a meeting held on June 7, 1963?

A. There was.

Q. And you have already testified you were not present?

A. I was not.

Q. Were you informed of the results of that meeting? [fol. 15] A. Yes, I was informed by Mr. Cole afterward.

* * * *

Q. (By Mr. Stange) Then, after that June 7 meeting, what did you do, if anything?

A. After talking to Mr. Cole I wrote the company another letter stating I understand we would put our position in writing again which I did. We referred to our position that we were opposed to an incentive bonus.

[fol. 16] * * * *

Q. (By Mr. Stange) As a result of your letter of June 7, was a meeting set up?

A. Yes, another meeting was later agreed upon to be held, I believe, the date was July 15.

Q. And was the meeting held on that date?

A. Yes.

Q. And were you present at the time of that meeting?

A. Yes.

Q. Where did that meeting take place?

A. At the company office on Sunset Drive.

Q. Who was present?

A. I was present. Allie Cole was present. Two members of the plant shop committee were, Jack Taylor and Morton Hoye.

Q. Do you recall approximately what time of day that might have been?

A. I think 3 p.m.

Q. Now, at this meeting, did the matter of the incentive pay plan arise?

A. Yes, we brought it up. I brought it up.

[fol. 17] Q. What is the best you can recollection—tell us what you told the company representative and what was told to you.

A. I made an effort to talk them out of it and asked them to discontinue it.

Q. Will you tell us, did you explain to them what your position was based upon?

A. Yes, we stated our position was based on the fact we had agreed to our hourly rate of pay. We had not agreed to any incentive bonus, that we would not agree to a bonus. We didn't think the subject was one that could be opened for negotiations at that time since the contract including wages was closed. I recall stating that if it was necessary for us to litigate the matter, we thought that we would be able to beat the company in the litigation and suggested we just discontinue it.

Q. And what was the company's position as expressed to you?

A. Well, they didn't agree to discontinue it and more or less laughed about my statement that if it was necessary to litigate, I thought we would beat them and said it wouldn't be the first time. It was more of an informal sort of attitude. No agreement was reached.

Q. Did you discuss the terms of the incentive pay plan at all?

A. No, just that we were opposed to that type of wage adjustment. We didn't discuss the specific terms.

• • • •

[fol. 18] * * * *

CROSS-EXAMINATION

Q. (By Mr. Tichy) Mr. Weller, you indicated the first meeting in the series of the negotiations occurred on October 2, 1962. The last meeting was on April 19, 1963, was it not?

A. Yes.

Q. Now, you testified that with respect to the period during which the contract was being negotiated that the company discussed its desire to establish a premium pay plan, is that what I understand your testimony to be?

A. No, I don't think I said that. I said it was raised. The discussion, as I recall, revolved around the J. Neils Lumber Company.

Q. Wasn't it also true that the Mount Lolo Lumber Company was mentioned and their premium pay plan?

A. Not to my recollection. We were talking in terms of the Plywood operation. In fact, I don't know Mount Lolo has an incentive plan.

[fol. 19] Q. What I was trying to recall for you was whether or not in the course of that discussion there was discussion of other premium paid plans such as the one at Mount Lolo?

A. Not that I recall.

Q. Now, wasn't it true that these so-called premium incentive plans were discussed at some length in the meeting, particularly that which occurred on March 12, 1963?

A. I don't think so, in fact, the company didn't actually propose any incentive rates.

Q. The company didn't make any specific proposal as to given rates?

A. No.

Q. Didn't the company advise you and your associates representing the union that they were studying an incentive or premium program?

A. That they had and probably were studying it or considering it or something.

Q. And that they were anticipating putting one into effect?

A. They may have said they would like to or had in mind something like that but they didn't anticipate they were going to put anything into effect.

Q. Talking about this premium or incentive plan, the reference was to the glue spreaders crew?

A. It was.

Q. At the meeting on July 15, which you described to [fol. 20] be the meeting at which you were in attendance, the particular meeting concerning the premium pay plan which has been introduced as General Counsel's Exhibit No. 3, did you or the union make any inquiry or request any information in connection with it?

A. No, we didn't. We just said we didn't like it and wanted to discontinue it.

Q. So the whole point in that July 15 meeting was that the union wanted the plan discontinued. They didn't want to talk about it or to negotiate concerning any revisions in the plan.

A. We didn't propose any revisions, no. I didn't think from either side any revisions were discussed.

Q. The company explained, did it not through Mr. Bright at some length why it felt justified in establishing this plan, did it not?

A. Yes.

Q. And can you recall for us what was said?

A. No, not all what was said. Substantially, they felt it would be a good thing for the company and also for the employees.

Q. Didn't the company point to a provision in its contract and say we believe we are entitled—

A. (Interrupting) They considered it to be a premium rate of pay which we disputed.

[fol. 21] * * * *

MR. TICHY: So that the record might be complete at this point, Mr. Trial Examiner, I would propose that we read into the record at this point Paragraph (a) of Article 17, Wages, * * *

* * * *

Q. (By Mr. Tichy) Mr. Weller, the company officials, did they not refer to this portion of the contract as justi-
[fol. 22] fication for the premium pay plan?

A. Yes, I think so.

Q. And was there considerable discussion as to whether that was applicable or not?

A. There was from our side of the table. We pointed out this was not the regard of a particular employee and it wasn't for special fitness, skill, or aptitude or the like.

Q. At this point you are expressing the opinion of the union.

A. I think I am repeating what we said.

Q. But you were expressing what was the opinion of the union.

A. Yes, we pointed out also this dealt with, I believe, nine crews of employees whether they were brand new, experienced, had skills or didn't have skills or what. It didn't deal with a particular employee.

* * * * *

Q. Now, in your testimony concerning the discussions prior to the agreement on the contract which has been introduced as General Counsel's Exhibit No. 2, you indicated that a point was not seriously raised. Do you recall that testimony?

A. That is correct.

Q. The reflection or the observation that the point was
[fol. 23] not seriously raised is a conclusion on your part. That is the way you feel.

A. Yes. I do recall, George, in the last two bargaining sessions, April 19 and the meeting in March 12, I believe is right, the wage discussion revolved around the glue spreader crews. The company was proposing a lower wage rate on the spreader crews and we were insistent upon increasing those rates and the rate scales for the spreader crews.

Q. However, the company at those meetings did indicate they were contemplating a study of premium pay rates for spreader crews?

A. Not in either one of those meetings. It is possible one of the discussions might have been in one of those

meetings but it never got to the point of proposal of any kind.

Q. But no specific proposal. The company indicated they were studying and planning?

A. Yes, that they were giving thought to it. That is correct.

Q. You are, are you not, also the business representative for Local Union No. 2405 involved in these proceedings?

A. Yes.

Q. And you were also the business representative of the Montana District Council?

A. Right.

Q. And the Montana District is made up of all of the plywood, Lumber and sawmill workers, loggers, local unions in western or in Montana?

[fol. 24] A. In Montana, yes.

Q. And among those local unions is the one Local 2797 and you are the business agent for them?

A. Yes.

Q. And there is a Local Union 2685 in Missoula and you are the business agent of it?

A. By virtue of the business district council secretary. I am a business agent of it. The local has another business agent too.

* * * *

REDIRECT EXAMINATION

Q. (By Mr. Stange) Mr. Tichy, has suggested that the company presented you with a plan or discussion of a plan for a method of changing the glue spreader crew method of payment, is that correct?

A. He suggested that.

Q. But no details of this were—

A. (Interrupting) I can't recall that we even have seriously discussed it. It was just a general discussion.

Q. Do you know, approximately, how many employees are employed in the production department at this company?

MR. TICHY: Mr. Stange, I am prepared to offer you a stipulation which I feel in the interest of a good record,

would avoid putting Mr. Weller on the spot and having the actual facts.

I am proposing this stipulation. In May 1963, the total [fol. 25] number of employees coming under the collective bargaining unit involved here was 181; in June 186; July 201, August 199, September 194. I wish to change my stipulation. That is as of the first day of the month of each of those dates that was the total number of employees coming under the collective bargaining unit involved in these proceedings.

* * * *

MR. STANGE: Mr. Tichy, I have been informed those totals include the separate company Veneers Incorporated and not just C & C Plywood.

MR. TICHY: If your attention was closely applied, I talked about all of the employees coming under the collective bargaining unit. * * *

MR. STANGE (interrupting): To save time, I am prepared to accept your stipulation * * *

[fol. 29] * * * *

RECROSS-EXAMINATION

[fol. 30] Q. (By Mr. Tichy) Turning to General Counsel's Exhibit 3 which is the premium pay plan, in order to qualify for the additional wage specified therein an employee is required to as a result produce more of the product than he is working on, isn't that true?

A. A crew is required to.

Q. Well, now, a crew ordinarily consists of how many men, do you know?

It's usually four men, is it not?

A. I would say six.

Q. From four to six?

A. Yes.

Q. Well, are you contending that under the General Counsel's Exhibit No. 3 that this is not a method of paying an employee a premium rate?

A. Yes, because it depends on the production of the entire crew.

* * * *

MR. STANGE: Are you aware of anyone receiving, in fact, a premium paid at C & C Plywood over and above the scheduled rate?

THE WITNESS: Individuals?

MR. STANGE: Individuals.

THE WITNESS: Yes.

MR. STANGE: Has the union raised any objection to these?

[fol. 31] THE WITNESS: No, it provided in our contract—as a matter of fact, at least one member of one of the spreader crews has a premium rate over and above the other contractual rate. He actually loses his premium rate whenever they meet this production figure because then he gets the same as everyone else.

* * * *

MR. TICHY: Mr. Weller, are you familiar with the premium pay plans in existence at some of the other operations under essentially this same language in western Montana where more than one individual is involved?

THE WITNESS: They are not premium pay plans. We have some car loaders on a piece load basis.

MR. TICHY: Where about?

THE WITNESS: Stoltze Lumber Company, and I believe at J. Neils Lumber Company. * * *

* * * *

MR. TICHY: Are you in a position to testify that the Mount Lolo arrangement is a flat hourly rate if they fail to reach a certain norm?

THE WITNESS: Not guaranteed. They have a guaranteed rate.

MR. TICHY: Which is the contractual hourly rate in [fol. 32] the absence of meeting certain norms.

THE WITNESS: They have a contractual piece rate work with a guarantee, a minimum guarantee.

MR. TICHY: It is an hourly rate at the lowest?

THE WITNESS: No, they work on piece work basis but are guaranteed to make so much an hour.

MR. TICHY: Are you certain of that now?

THE WITNESS: Yes. We have the same situation just going into effect at Anconda Company, guarantee $2.10 an hour but the rate is piece work rate.

* * * *

MR. STANGE: General Counsel calls Mr. Allie Cole.

* * * *

DIRECT EXAMINATION

Q. (By Mr. Stange) Will you state your full name and address.

A. Allie Cole, International Representative, Brotherhood of Carpenters, P.O. Box 71, Lakeside, Montana.

Q. And how long have been the International Representative?

[fol. 33] A. Twenty-one years or a little better.

Q. You have been present in the room during the testimony of Mr. Weller, is that correct?

A. Yes, I have.

Q. And you have heard Mr. Weller testify that he directed you to attend the meeting on July 7?

A. June 7, 1963.

Q. To discuss the matter of the incentive wage plan with C & C Plywood Corporation?

A. Right.

Q. Would you tell us, please, what took place—well, first, where did that meeting take place?

A. At the company office.

Q. And what time of day?

A. Approximately 8 o'clock.

Q. And who was present at that meeting?

A. I acted as the spokesman on behalf of the District Council and local union. There were three committee members, Mr. Hoye, Stinger, and Taylor were the three committee members.

Q. At that meeting did you discuss the glue spreader crew pay plan?

A. Well, that was the main purpose of the meeting. We discussed that and several other grievances that came about. We discussed them at that particular meeting.

This particular situation concerning the bonus system that [fol. 34] was instituted by the company, that was the first item of discussion that particular day.

Q. Can you tell us what took place during the course of this discussion, what you said to the company representative and what was said to you, please?

A. Well, I stated my position and I said it was the position of District Council that we were opposed to the institution of the bonus system by the company as has been posted on the bulletin board and that we thought that it was a direct violation of Article 17 of the working agreement that was previously entered into between the union and the company and I think at that point, if I remember correctly, Dexter Bright, who was representing the company at that meeting, he stated why the union was so concerned about the bonus plan when it seemed to be the company figured the employees were satisfied and I stated at that time that it was my opinion after conferring with most all of the employees that were directly involved with the bonus system on the glue spreader crew, that at least 95 per cent of those were most unhappy and dissatisfied with the bonus system.

Q. Were you aware how this bonus system or incentive system or premium pay, whatever it may be, called, operated?

A. Yes, I was.

Q. Can you tell us how this plan operated?

A. Well, they have to reach a production goal over a period, as I understand, each week of, I think it is 64,000 in order to qualify themselves for the bonus system over [fol. 35] and above their contractual rate.

Q. What was the contractual rate?

* * * *

THE WITNESS: It would be the core feeder at $2.24; the core layer, $2.29; the sheet turner, $2.15. I do not know that those others are involved in the overall crews that operate as spreader crews. I know those are involved. I have never worked directly in a plywood plant but I know from talking with the people working there, those particular classifications are involved in this bonus system.

Q. (By Mr. Stange) Were you aware that there was a member of one of the glue spreader crews who was receiving over the classified wage scale?

A. Yes.

Q. Do you know who that was?

A. Darrel Osborn is, as I understand, receiving $2.40 an hour. He was a core layer as I understand.

[fol. 37] * * * *

Q. Did you discuss this premium plan at any union meeting?

A. Yes, we talked about it at the union meetings.

Q. And you have already testified you had been informed that the majority in your opinion objected to this plan?

A. Right.

* * * *

MR. TICHY: I am going to object. * * *

[fol. 38] * * * *

TRIAL EXAMINER: Well, I think I understand the issue here. I am going to overrule the objection and permit the testimony and I am going to state for the record the basis on which I am making my ruling. If there are any further observations that you may want to make, I will hear them at the time. On the basis of the portion of the contract which you read into the record and to which my attention has been directed, the heart of the matter appears to lie in the second sentence of Article 17. As I read that sentence, the right which the Employer reserves therein has three elements. What is reserved is the right to pay, one, a premium rate over and above the premium contractual rate; two, a premium rate having those characteristics which is calculated to reward particular employees; three, a right to pay a premium rate over and above the contractual classified rate which rewards such employees for special fitness, skill, aptitude, or the like. We have three elements to consider. Now, I take it that if the company says, as you indicate, [fol. 39] they will, that this particular plan reflected in General Counsel's 3 is an exercise of the employer's re-

served right. The question of whether or not the plan as drawn and as effectuated, meets all those three qualifications is one presumption you will have to decide to determine whether the plan falls within the employer's reserved right. To the extent that the union's position with respect to that aspect of the matter was taken on the basis or adopted on the basis of representation's made to the union representatives by employees, I think I am going to be interested in what the representations were made to the union by employees.

MR. TICHY: I would like to make this observation in light of what you have said, Mr. Trial Examiner. I also am confident from your skill and experience in this field, you will recognize it is hearsay evidence that is being testified.

TRIAL EXAMINER: So understood.

* * * *

Q. (By Mr. Stange) Now, would you tell us, please, what the objections were that were expressed to you in the operation of this plan by your members.

MR. TICHY: With all due respect, I would object and have continuing exceptions.

TRIAL EXAMINER: You have a continuing objection as to this particular line, namely, what the witness [fol. 40] may have heard from union members and for the record the objection is overruled.

A. Well, in discussing the bonus system, it was instituted by the company with the various members of the spreader crews. Their objections were primarily based on the fact that there was many elements entered into, whether they would be able to achieve the maximum production in order to gain the bonus. In other words, they said, an example, the lifters operate or bring the proper material to the spreader crew, could he effect the production in one particular day and—

Q. (Interrupting) Lift truck operator is not a member of the glue spreaders?

A. No, he brings his material to the spreader crews?

Q. What you are testifying then, they were objecting their premium pay depended on the activity of some other employees in some instances?

A. That is correct. From there on they objected to the fact of this makeup of the spreader crews. If there happened to be two of them that were inexperienced, they would greatly effect the outcome of the production that would qualify them for making the bonus system. For example, if there was an inexperienced sheet turner, that would have a direct effect on whether they would ultimately make the bonus that day or for the weekly period. There was many elements involved in the process of bringing the material and handling the material up to the finished product which would effect the outcome of [fol. 41] whether they would make a bonus or whether they didn't. As I understand it, there was only one crew, which was a special made up crew, that made the bonus for sometime out of the four, whatever number, of spreader crews there were.

* * * *

[fol. 42]

CROSS-EXAMINATION

* * * *

Q. If I understand your testimony correctly, Allie, what you have told us, then, is that if the spreader crew, consisting of the core feeder, the core layer, and how many sheet turners?

A. Two.

Q. Two sheet turners, that if they produce more than you might say an average day or usual day that, then, they get this bonus?

A. Not just one day. It is over a period of time.

Q. Over a period of a week, is it not?

A. I think to begin it was over a period of two weeks and the company then changed that to one week. It was changed from the original bonus system at a later day from two weeks to one week.

Q. The point is this program permits an employee to increase his classified contractual rate by greater production?

A. Permits him to earn a bonus providing he meets a

[fol. 43] certain quota at the end of a weeks period.

Q. And have you watched these crews, these glue spreader crews?

A. Not to any extent.

Q. You are not specifically familiar with any of the skills involved?

A. Not other than what the employees themselves have told me.

Q. Now, the conversations that you talked about were, did I understand you, with union members or did you say employees?

A. Well, I don't remember exactly what I said, but I have talked with both union members and I think one that perhaps, to my knowledge, wasn't a union member.

Q. However, not all of the employees engaged in spreader crews are union members?

A. I wouldn't rightly know.

Q. Then, I did Understand your testimony to be that at no meeting that you attended was any reference made to Mr. Osborn or his wage schedule or anything concerning his premium arrangement?

A. What kind of meeting are you referring to?

Q. Negotiations with the Employer.

A. Not to my knowledge.

Q. Or grievances on the one on June 7 and the one on July 15?

A. I will put it this way, Mr. Osborn's premium rate, hourly rate, wasn't discussed before anyone of the management.

[fol. 44] * * * *

MR. TICHY: Mr. Trial Examiner and Gentlemen, we would propose to stipulate that the total numtlemen, we would propose to stipulate that the total number of employees employed on glue spreader crews on April 1, 1963, was 26. On May 1, 1963 was 26; on June 1, 1963 was 30; on July 1, 1963 was 32; on August 1, 1963 was 32; on September 1, 1963, was 32. * * *

* * * *

[fol. 45] * * * *

MR. STANGE: With this understanding I have no objection in joining with the stipulation.

TRIAL EXAMINER: Very well, the stipulation is accepted.

MR. STANGE: General Counsel rests his case in chief.

MR. TICHY: May it please the Trial Examiner, I will move for a dismissal of the Complaint and I wish to speak to this in a brief manner but yet in very great earnestness because I feel that although there has been to my own knowledge and experience a reluctance on the part of trial examiners to dismiss a proceeding at this stage of the proceeding, I feel we have here a case which clearly and uninequivocally warrants a dismissal at this time.

* * * *

[fol. 49] MR. TICHY: At this time the Employer will call Mr. Clay Thomason.

* * * *

DIRECT EXAMINATION

* * * *

Q. Your present position?

A. General Manager and Assistant-secretary for C & C Plywood Corporation and general manager for Veneers Incorporated.

[fol. 50] Q. How long have you been occupying those positions?

A. C & C Plywood since 1959, Veneers Incorporated since 1960.

Q. How long have you worked in the veneer and plywood industry?

A. Fourteen years.

Q. Are you thoroughly familiar with the functions of the glue spreader crews at C & C Plywood Corporation?

A. Yes, I am.

* * * *

Q. A glue spreader crew consists of how many individuals?

A. Normally four. We have had one instance where the crew consists of three for a short period of time.

Q. Now, those four, when it consists of four people, would normally be what job classification?

A. One core feeder, two core layers, one sheet turner.

Q. And, now, which of those jobs would be the first in the course of following the material in its normal progress?

A. Core feeder.

Q. Will you tell us what a core feeder does?

A. The core feeder feeds the cross banding veneer through the glue spreader machine to the core layer. He must feed the core rapidly, exactly, with a certain amount of rhythm. He must watch the glue level in the machine. His particular responsibility is to the top roll on the glue spreader which contains two rolls a top and bottom roll.

[fol. 51] Q. There is glue in a vat-like sort of affair and then this glue goes on these two rolls which in turn as the material goes through the two rolls, glue spreads on both sides, is that correct?

A. That is correct.

Q. Perhaps to better understand this, will you explain to us how plywood is made in terms of layers and direction?

A. The eight-foot direction or the face veneers on a panel of plywood are laid up together with a cross band separating the two faces and in the case of five ply, we will have three center portions of veneer or two cross bands with glue, a center and the two faces making a five-ply panel. These are prepared in advance of the press at the glue spreader in what we term batches which may contain 35 to 40 panels in one particular thickness and up to 80 to 100 in another particular thickness. These are then transferred to the cold press or hot press and placed under pressure until the glue is cured. When the panels are removed from the press, the faces being laid directly adjacent to each other have no glue between them which separate the panels.

Q. Now, when you have a three-ply plywood board, you have a back which is normally a piece four foot by eight feet, approximately, is that correct?

A. Four foot wide by eight feet long.

Q. And then you have a core that runs in the opposite direction to the back, isn't that correct?

[fol. 52] A. Ninety degrees, that is correct.

* * * *

Q. (By Mr. Tichy) And this core has glue on both sides of it?

A. That is correct.

Q. So when the face, again a four foot by eight foot piece of veneer, is placed on top of it and the three pressed together you then obtain a three-ply plywood board, is that correct?

A. That is correct.

Q. And a five-ply plywood board is esentially the same except that you have what you would call a center which, again, goes in the same direction or grain runs in the same direction as the face and the back?

A. That is true.

Q. And then the core would be, or, rather, what would you call those two that go the opposite direction?

A. They are cross banding core.

Q. Now, the core feeder, you say, takes these cross-banding pieces of veneer and he runs it through the glue spreading machine?

A. That is correct.

Q. And what happens after it gets through the glue spreading machine?

A. The piece of core is spread on both sides with glue and is then caught by the core layer and placed on the [fol. 53] load directly in front of the glue spreader which is the spot for building up this batch of plywood. The core layer then lays the pieces side by side the full length of the sheet and the panel.

Q. Then, what is the next step in this procedure?

A. Then, the sheet turner and other core layer, who relieves in two-hour periods, place the next face on the cross-band core.

Q. And having placed that next layer, then, more core comes through the glue machine and this process is just repeated and repeated?

A. That is correct. They place the back on one panel and the face on the other panel at the same time.

Q. So they will have when they are placing the back on the face, the sheet turner will have two pieces in their hands as they put it down?

A. That is correct.

TRIAL EXAMINER: What you are describing is five-ply panel?

THE WITNESS: That is three-ply panel. In a five-ply panel, they will place two sheets. Then, the next time they will place the one center piece because there are two crossbands of core with glue on them placed in a five-ply panel so they will put on one single, center on, then the two faces again, then, the single center, then the two faces again.

Q. (By Mr. Tichy) Actually, then, at a given moment forgetting about the names of job classifications as such, at a given moment the crew consists of a core feeder, a core layer, and two individuals who are acting as a [fol. 54] sheet turner, is that correct?

A. That is true.

Q. However, in your system at C & C Plywood you have the core layer and one sheet turner alternate and since the core layer receives a higher rate of pay under th contract than the sheet turner, that combination, those two combination men, receive core layer rates, is that right?

A. That is correct.

* * * *

Q. (By Mr. Tichy) Now, returning to each of these jobs, what special skills, aptitude, and fitness, and the like is necessary for a core feeder to operate at peak efficiency?

A. The core feeder, first of all, must have excellent coordination to attain the extra volume, the extra production, and he must be able to feed with both hands independently, pick up one piece of core and feed it through with his one hand while he is grabbing the next piece of with his other. Good vision is a very definite advantage whereby he can watch the piece of core that he is preparing to feed which he must also grade to be certain that

it has straight edges. He can watch the glue roll to be certain the top roll has sufficient volume of glue and he must also, during all this process, keep up with the core layer who is moving across, lengthwise, with these panels [fol. 55] and catching the core. Now, he also is required to watch the mirror directly over the core layer, which indicates when he is coming to the end of a panel.

Q. Did you say mirror?

A. Yes. It is up above. To obtain what we felt in this program, he must be willing to produce extra effort involved in each one of these abilities.

Q. Now, does he have to concern himself with the manner in which the material is coming to him?

A. It has a very definite—it does not have a definite bearing but it is helpful if the material is stacked properly, yes.

Q. What is the purpose of that?

A. So that he can quickly grasp the next catch of core when he completes what he has on his table.

Q. Does it make any difference whether he puts veneer core through the machine at right angles or diagonally or even opposite to 90 degrees?

A. This is very important for the core layer to be able to catch the material. He is working on the opposite side of the batch of plywood that is being laid up, consequently, he is over four feet from the glue spreader. This crossbanding material is only a little over four feet, four foot, four inches long, and if it is not fed through straight to the core layer, he is unable to grasp it and lay it in a fast and proper manner.

[fol. 56] Q. Does the batch operate relatively slowly or fast or what is the manner in which the batch operates?

A. The machine operates relatively fast.

Q. Is it possible for a core feeder to put two or even three pices together or through the machine simultaneously?

A. It is possible but certainly not accepted because it would only spread the glue on one side of the core.

Q. What would happen if more than one piece was simultaneously fed through the machine?

A. It would have to be refed. The pieces would have to be fed back to the—

Q. (Interrupting) Does this slow down the procedure?

A. It stops the procedure until the core is passed back through again.

Q. Is it possible to throw it away rather than feed it back through?

A. It is possible, but it is not accepted by the company.

Q. In other words, the company's policy is to salvage all usable material?

A. Yes.

Q. * * * What is involved in the grading?

A. In each piece of core is given the spreader in a specified grade. Each panel of plywood is laid up to specified grade but the core feeder is particularly respon- [fol. 57] sible for watching the edges and end of the core to be certain that they are straight and true before he feeds them through the machine. If a piece of core is broken in the handling before it reaches the core feeder or if a knot or defect should drop out of it before it reaches the core feeder, it is his responsibility to discard this piece of veneer before applying the costly glue to the piece.

Q. Is there any particular skill to his feeding it through the machine in the sense that—first of all, how wide is this machine?

A. Fifty-four inches wide.

Q. And the veneer or rather the plywood he is in the process of working on or the crew is working on is actually abutting the 54 inches on the eight foot side, is it not?

A. That is correct.

Q. Is there any skill or aptitude or fitness involved in how that is fed through in terms of where it is fed in the machine?

Q. Very definitely. The panel is originally started to be laid up from one end and the core must be laid tight and close together continually across this sheet of veneer. If he should have his core layer on the right side of his panel being laid up and he feeds the core through the left side, the core layer cannot reach this piece of core. He

must then move over and pick up the piece of core and transfer it to the other side.

Q. So that as I understand, a skilled core feeder is going to put it through the machine at the point that is [fol. 58] handiest for the core layer?

A. Yes.

Q. What happens if there is a feathered edge on the pile of core veneer that is handed to the core feeder?

A. The core feeder detects this feathered edge and this is also the difference between a person feeding core with a great amount of skill. He can detect a feathered edge in most cases and will rip the thin piece off the veneer before feeding it through the machine or if it is tapered to the point that the entire piece is defective, he will discard it before passing it through the glue machine.

Q. How or is there any skill, fitness, or aptitude involved in the pace or amount of core that the core feeder pushes through that machine?

A. Very definitely.

Q. Will you explain that?

A. In the amount that he can feed through is directly related to the amount the crew on the other side of the machine crew are going to lay out. If the core feeder is not well coordinated, is not capable of detecting these grading and other defects involved in the piece of veneer and slows down the other operation by improper feeding, this will effect the volume that can be produced.

Q. Can the core feeder decide to just put one piece in after another without any sort—

A. (Interrupting) No, he cannot. He must work in [fol. 59] direct relationship with the core layer to keep the panels, the core, land evenly and true and to also make the core layer's job much more efficient.

Q. So that, as I understand from what you say, after he feeds through approximately the equivelent of eight feet or slightly more of core laid side by side, he then pauses until he sees the sheet turner put down either the center sheet, if it is five-ply or in either of the other instances, the top and bottom?

A. That is correct.

Q. How does he know this, because isn't there a machine between the core feeder and core layer?

A. Yes, the glue spreading machine is between them. This is what I was referring to by the mirror, where he is watching the core layers work. When the core layer reaches the end of the panel, the core feeder must feed the piece of core of the right width to avoid waste. After this is done, then, he knows the sheet will be put on before he must feed through any more core. If he feeds an extra piece through, then, the core layer must grasp this piece of core, remove it from the core laying table, and hold it in his hands until the sheet has been applied. This also alert the core feeder as to when he can feed his next piece through to start the new core line.

Q. Does the core feeder take the material that is brought to him, these core veneers, in the order in which they are given to him or does he have to make some selection other than grading in respect to getting this?

[fol. 60] A. He definitely selects it as to width.

Q. Did I understand you to say there is a sense of timing involved in the core feeders activities?

A. Very definitely.

Q. A sense of timing is involved from the time the sheet is placed on until the next piece of core is placed through the machine. If he is hesitant, then, lost production results. If he is too quick he will catch the sheet before it is actually placed on the load causing damage to both the core and the sheet.

Q. Before going to the core layer, you have already testified that you have been in the plywood business for 12 years.

A. Fourteen years.

Q. And you have examined glue spreader crews not only in your own operation, but many others?

A. That is right and I have also worked on the glue spreader crews personally.

Q. And as a consequence of what you have just said, is it your opinion that there is a special fitness, skill, aptitude or the like necessary to do a better than average job as a core feeder?

A. Very definitely.

Q. Do you wish to elaborate on anything you have said in order to elaborate on the statement you have just made?

A. No, I think that covers it.

Q. Coming to the core layer, I believe you have al- [fol. 61] ready said that he takes each of these pieces of core as it comes out of the rolls of the core feeder machine and then he lays it down, as I understand it, on this plywood back or plywood back or center board that is laying before him. What is the procedure there?

Q. The core layer catches the core and starts from one end of the sheet, face or back, and lays the core at 90 degrees to the grain direction of the sheet, side by side, continuously across the panel.

Q. Is it permissible for him to lap one piece over another?

A. No, this results in rejects.

Q. What do you mean by reject?

A. A rejected panel that will not meet grade specifications.

Q. Its value on the plywood market is—

A. (Interrupting) Considerably less.

Q. Can he permit gaps between his pieces of core?

A. This is equally as bad as the core laps because this will result in rejected panels also.

Q. Therefore, as I understand it, the core must lie side by side as it is laid on this, in making up this plywood panel?

A. Yes, this is true.

Q. What does the core layer do if the core feeder has fed through two or three pieces erroneously and they all come through at the same time?

A. If the pieces that have come through erroneously have glue spread on them on both sides, he will separate [fol. 62] them. If they have been fed through one on top of the other through the machine whereby only one side of one piece may have glue on it, he must pass it back to the core feeder and he in turn must refeed the material back through the machine singularly.

Q. So there is apparently no harm if he feeds two pieces through simultaneously side by side?

A. Other than the fact that the core layer would not be expecting two pieces to come side by side and would result in one piece dropping to the floor or to the bench without the core layer catching it.

Q. But when two or more pieces come through simultaneiously, one on top of the other, then it must be pasted back as I understood it?

A. That is correct.

Q. Unless in the process of coming through it became broken?

A. It would be discarded then.

Q. Does the core layer engage in any grading activities?

A. Oh, yes.

Q. Explain that.

A. The core layer in the sense grading the entire core line of the panel by the straightness of the edges, the closeness of the pieces to one another, the amount of end trim on the panels that will be required, these panels are manufactured over eight feet and when they are sawed we saw off the trim. The core layer is responsible for [fol. 63] seeing the core is long enough and wide enough to cover this entire area. In the same respect, if a piece coming through the glue spreader machine and was damaged by knot falling out or the piece being caught or split up in the glue spreader machine, he must grade to determine whether the piece would be utilized or discarded.

Q. Does the core layer have any responsibility with respect to the glue spreading machine?

A. Yes, he does. The core layer is responsible for watching the bottom glue roll to be certain the automatic glue spreaders are functioning properly, and the core is being spread with glue on the bottom side.

Q. Is it possible for pieces of veneer, which as I undrstand it, is quite a thin item. How thick is it?

A. It will run from one-sixteenth of an inch to one-quarter of an inch but your main sizes are one-eighth and one-sixth.

Q. Is it possible, because of the thinness, the quality of the material, for pieces to fall off from the veneer as it

goes through the glue machine or is being handled at the glue machine, this is a happening every day that requires the glue spreader machine to be washed down at a minimum of eight hours and in some cases four hours?

A. Yes. The knots will drop out, pieces will break off while it is being pressed through the two rollers spreading the glue.

Q. Is it the responsibility then of the core layer to watch that bottom roll if something sticks to it to remove [fol. 64] it or stop it or something?

A. Yes.

Q. You say, I believe, the core feeder has the responsibility for watching for things like that on the top?

A. Yes.

* * * *

Q. He has to be sure, as I understand you, the glue is on both sides fully spread?

A. Yes, he can determine through experience whether the glue is being spread in sufficient volume on the core to adhere the panels together. In the event it is not, it is not his responsibility to change the machine but his responsibility to call it to the attention of people who will.

Q. Now, again referring to your skill, experience, and knowledge of plywood operations and particularly glue spreader crews, is it your opinion that a core layer must have a special fitness, skill, aptitude, or the like in order to be able to perform in a manner better than the average core layer?

A. Yes, very definitely.

* * * *

[fol. 65] Q. Will you please go into more detail about catching the veneer that has the glue on it as it comes out of those rolls. Is there any skill involved in that?

A. Very definitely. Core layers wear a pair of gloves to keep from contacting with the glue and this piece of core is exceedingly slick and it takes a great deal of skill to catch this core and lay it on the panel. It is one of the main reasons his skill is one of the highest paid individuals in the plywood plant.

* * * *

Q. Turning to next the job of sheet turner, as I understand, on each of these crews normally there are two sheet turners?

A. There are two people that are working as sheet turners.

Q. At a given time?

A. Yes.

* * * *

A. * * * We do classify one as a core layer and he is paid as a core layer.

Q. Please describe for us what the two individuals do that are remaining on the crew. We have talked about the core layer and core feeder. Now, the other two that are left.

[fol. 66] A. The two sheet turners prepare the eight-foot sheets for laying on the batch after the core layer has completed his line. They must be certain that the sheets are properly prepared, have a straight edge and ends lay against the back board. They must be certain that the sheet meets the grade specified in the event that mishandling or defects have developed since the sheets were graded at the dryers. They must count correctly the number of panels that are laid up in each batch. Each batch being separated by what we refer to as press boards. These press boards are placed in the batch at given intervals to keep the panels from reflecting defects from the bottom or, for example, to the top of the batch. In the event that a series of core laps were made in the bottom portion, this press board which is a heavy plywood panel is placed in the batch and this prevents this core lap from transferring to the top panels and resulting in cracked panels.

Q. When you talk about a batch, you are talking, as I understand it, the making up of these plywood panels in rough behind the glue spreader machine?

A. That is correct.

Q. Whose responsibility is it to be sure that the one of the straight ends or rather edges is against this back board?

A. This is the sheet turner.

Q. When they place it down, they are to be sure it is there?

A. Yes.

[fol. 67] Q. If it isn't, what happens?

A. Then the thing is going to be rejected because the sheet will be too far from the edge for sawing or the core layer must stop his procedure and push the sheet to the back board. Incidentally, the sheet turner must also make out the batch tickets, which are the basis for the production record for the crew.

Q. Is there any special skill required of the sheet turners?

A. Very definitely.

Q. And would you describe this?

A. The sheet turner also must be well coordinated. They must have the ability to work together. If one sheet turner is a little slower than the other, it will be impossible for them to place the sheets on in an efficient and orderly manner that would not result in broken sheets or interrupting the layup process by the core layer having to stop. They must also turn the sheets while the core layer is laying his line so that the straight edges are prepared in advance of the laying of the sheets on the batch.

Q. Now, if you have poor sheet turners, is it possible for them to ruin material that would be used as a face or back or center?

A. Yes, very definitely.

Q. As we discussed a few moments ago, it is my understanding, it is possible because this is a rather thin piece of veneer you are working with for pieces to break off or become intermingled in the load.

[fol. 68] A. True.

Q. Who is responsible if one of these little sticks or slivers or whatever you wish to call them should arrive at this point and could be put right into that batch?

A. It is the sheet turner's responsibility.

Q. What is responsibility in that connection?

A. To remove it or replace the sheet.

Q. The sheet turners are ordinarily working with what size sheet?

A. Four by eight. To clarify that, four foot plus the trim and eight foot plus the trim.

Q. There is one man on each end?

A. That is correct.

Q. In the handling of this, if it is not handled properly, it can be broken or ripped?

A. That is correct.

Q. They must also determine and grade the sheets?

A. Each sheet must be turned so that the back side of the veneer is placed next to the core line. The piece with the glue on it. There is a face and a back side to every piece of veneer. The face side being the side that is outside of the log when it is peeled. This is tight and smooth. The back side of the veneer will be rough and loosely peeled. The standard that we manufacture are plywood requiring faces and back being placed with the tight side [fol. 69] out. If the sheet is not turned or through the entire manufacturing process has been turnd over for some reason, then, it is the sheet turner's responsibility to get this sheet in its proper manner before placing it on the batch.

Q. As a result of your experience, are there any special fitness, skills, or aptitudes or the like for a sheet turner to be a better than average employee?

A. That is true, yes.

Q. Do you wish to elaborate with regard to this on sheet turners?

A. Only to the respect, we have found through past years many cases where we have placed employees on the glue spreader crews in one of these four positions that have been willing and eager to learn these particular jobs but simply were not able to even maintain average production and we were compelled to remove them from these positions.

Q. You have been in the hearing room, have you not, since the beginning of this hearing?

A. That is true.

Q. I believe Mr. Weller testified that there could be four to six employees on a glue spreader crew, is that correct?

A. Normally, only four members. The only time we would place a fifth member would be in the event of exceedingly rough stock temporarily for placement of employees throughout the mill or in the event that one spreader crew was down for a very short period of time

[fol. 70] but under normal operations only four men to the crew.

Q. And in your operation, has it been any more than four men to the crew?

A. Very seldom.

Q. I hand you, Mr. Thomason, General Counsel's Exhibit No. 3, do you recognize it?

A. Yes.

Q. And is that the premium pay arrangement that was posted on the company's bulletin board on May 20, 1963?

A. Yes.

Q. Have you made any record as to the experience of the company and glue spreader crews under their premium plan?

A. Yes, I have.

* * * *

Q. (By Mr. Tichy) I hand you, Mr. Thomason, what has been marked for purposes of identification as Employer's Exhibit No. 1. Will you tell me what it is?

A. This is the tabulation by crews of the periods from May 20 when the glue spreader crew premium pay was inaugurated to last week. This list is each spreader crew and "yes" indicates the crew received the premium pay production volume and the pay rate and the "no" indicates [fol. 71] they did not receive the premium pay. On the bottom portion of the sheet I took the period prior to the start of the premium pay and listed it also from April 1, 1963.

Q. I observe in the upper quarter portion of this document there is the table of four men underneath Day #4 men and Day #2. Will you explain that?

A. The day shift #1 crew consists of four men. Day Shift #2 consists of four men. Day #3 four men. Day #4 consisted of three men until July 1. Then the crew was increased by one person to a four-man crew. The swing one is four men, the Swing #2 four men, Swing #3 four men and here again Swing #4 was three men until July 1 when it was increased one man to four men.

Q. I observe in going to the bottom quarter of the page that we see under Swing #3 for the weeks of April

1, 1963, through May 8, 1963, showing nothing. What occasions that?

A. We did not start this spreader crew on a permanent basis until May 13, 1963, and then we added the Swing #3 crew.

Q. The tabulation you have in your hands was taken from company records, isn't that correct?

A. That is correct.

* * * *

[fol. 72] TRIAL EXAMINER: Very well, Employer's Exhibit No. 1 will be received in evidence.

* * * *

Q. (By Mr. Tichy) How do you justify this proposal of May 20, 1963, as a premium pay plan?

A. I don't quite understand your question.

TRIAL EXAMINER: What makes your premium pay plan?

THE WITNESS: The company expects a certain volume of production through each spreader crew depended upon the length of time that a spreader crew has been in existence but this premium pay is based on extra skills and effort beyond this expected average. If the crew obtains the averages indicated here for the period of time, which has now been changed to one week, they will receive an increase in hourly rate to $2.50 per hour.

TRIAL EXAMINER: I want to be absolutely clear on that. I take it that under the classified wage scale in the core feeder, they are supposed to receive $2.24 if they satisfy your norm for the receipt of premium pay, rather the core feeder would get $2.50, the core layer $2.29 would get $2.50, the sheet turner rather than getting $2.10 would get $2.50 per hour?

THE WITNESS: That is right.

* * * *

Q. (By Mr. Tichy) Is a glue spreader crew required [fol. 73] to meet the norm established in this premium pay schedule General Counsel Exhibit's No. 3?

A. No, in fact when we intiated this program, we called each crew into the office as well as posting this and

explained the mechanics of the entire premium pay proposal and we told them at that time that this was something they could work to obtain but it was not something that was required if they received it, we would do everything we could to help them obtaining this level, but it was not required.

Q. Do you know of any employees being disciplined, discharged, reprimanded to or for failure to meet the standards set up the May 20 notice, General Counsel's Exhibit No. 3?

A. Definitely not.

Q. Have you checked with your supervisors to determine whether or not anyone has been reprimanded, suspended, disciplined on account of a failure to meet the standards suggested in the May 20 letter?

A. Yes, I have. I have checked with each of the other supervisors to be certain that have not.

Q. I observe that Item #1 on General Counsel's Exhibit 3, the notice of the May 20, states the footage will be computed on a pay-period time basis (every two weeks). That is the manner in which this is done now?

A. No, we initially started this program on a basis of computing the footage every two weeks, but we found that [fol. 74] this was not proving out to be satisfactory and so we changed it to one week period.

Q. Are there any other elements that have been changed, referring to General Counsel's Exhibit No. 3?

A. Yes. The hot press three-man crew who must average 3,750 feet has been changed to 4,000 feet when we added the fourth member to the crew.

Q. Those are the only deviations from the exhibit?

A. Yes.

Q. At the bottom of General Counsel's Exhibit No. 3, being the notice of May 20, it is stated "The Company will do everything possible to assist the crews in obtaining this footage by dividing the stock as evenly as possible, however, the foreman will make all stock decisions." Will you go into that?

A. The many different grades of plywood that are produced require different types and grades of stock. Some of these types of stock will result in higher production

material. The intents of this was to spread the better grades of stock to each of the individual crews so thereby enabling each of them to have an equal opportunity to obtain the footage requirements. We might further explain that we have some types of core that are two-foot wide by four-foot long and we have some types of core that will range from four inches wide to 20 inches wide. Naturally, the pieces that are two foot wide will result in a much higher production than the narrow pieces. This is [fol. 75] attempted to be divided among each of the spreader crews. The responsibility of this as we state relies on the management but we have attempted diligently to keep this as evenly divided as possible. In fact, we have taken cases on a Friday whereby one crew has practically obtained the volume for the entire amount and although it maybe their turn for better grade stock, we have purposely given it to another crew in order to enable them to obtain this volume.

Q. Handing you again Employer's Exhibit No. 1, we see a large number of "no's" indicating that the Swing #3 and the Swing #2 for example, I believe I only see one of each of those. Is there some explanation for that?

A. Yes, the Swing shift crew has proven to be over the past years the shift where new men are hired and the training program is in effect. The men from the swing shift after they have obtained the experience and seniority will then move to the day shift crews wherever a vacancy occurs. This results in the swing shift crews having the more inexperienced people and the day shift people having the more experienced people.

Q. And this transferring from the swing shift to the day shif' is in accordance with the collective bargaining agreement?

A. Yes.

* * * *

[fol. 76] Q. (By Mr. Tichy) During the testimony of the witnesses for General Counsel, we heard some reference to materials being brought by the lift truck affecting this proposed or premium arrangement. What can you tell us about that?

A. Well, this definitely could be the case. We, the company, has recognized this as well as the glue mixing

could affect this and the amount of stock on hand could affect this, so we have indicated and we have practiced that all lost time due to the spreading is not attributed to this premium pay rate in computing the amount of volume. If a spreader crew, for example, have to wait on the lift truck for more than 15 minutes, when the foreman turns in the production time at the end of that shift it is not computed on a full eight hour basis. It is computed on seven and three-quarter hour basis. This has been the case many times when lost time has developed. We didn't feel this was the responsibility or anything that the crews could control so we adopted the policy of subtracting lost time.

Q. Referring to the contract that has been in existence between the two companies and the local union and which has been introduced as General Counsel's Exhibit No. 2, the wage rates, I believe you have already testified to for the core feeder as shown as $2.24 an hour, core layer $2.29 an hour, and sheet turner $2.15 an hour, is that correct?

A. Yes, that is correct.

Q. Now, how does this premium arrangement work [fol. 77] insofar as this wage schedule is concerned?

A. If the crew obtains the volume and meets all the requirements listed in our bulletin, the hourly rate of pay for each one of the individuals on this crew, the four members, will be increased to $2.50 each regardless of the amount that they would exceed the requirements.

Q. In other words, if they would through their special aptitude and the like produce an average of 10,000 core line feet per hour, that is not going to give them any more rate than having made 7,500, is that correct?

A. That is right and will receive the $2.50 an hour.

Q. This $2.50 applies to each member of this particular crew, if I understand correctly?

A. That is right.

Q. Is it possible or has your company paid anything less to a crew feeder than $2.24 an hour as called for in the contract?

A. No.

Q. Is it possible or has your company paid any core layer for any less than $2.29 an hour under this contract?

A. No.

Q. And is it possible for a sheet turner to get less than $2.15 an hour or have you paid any sheet turner less than $2.15 an hour under this contract?

A. No.

Q. On what basis does the company believe that it can [fol. 78] pay the premium rate one week and then go back to the contract rate the next week?

A. On what basis?

Q. Yes.

A. As referred to in the working agreement under Article 17, which states that the premium rate shall not be considered a permanent increase in the rate of that position and may at the sole option of the employer be reduced to the contractual rate.

Q. So as I understand you to be saying, when in order to meet the standard set up in this May 20 bulletin, General Counsel's Exhibit No. 3, you feel there are skills, fitness, and the like which warrant a premium or higher rate, is that true?

A. Yes.

Q. So if they don't meet this, you revert to the contractual rate?

A. That is right.

Q. Was any reference or discussion undertaken in the meetings with the union that led up to the collective bargaining agreement concerning a premium pay system on this order?

A. This was brought out during the March 12 meeting. I specifically remember after a caucus of the members of the union negotiating committee that they returned to the meeting room and Mr. Clavadetscher, who was the Federal Mediater attending these negotiations stated that he felt there were only two issues left to be resolved. One was the union security clause and the [fol. 79] other was the glue spreader rates. At this time I informed the negotiating committee that we were not concerned about the glue spreader crew rates because the company had had under consideration for quite sometime

a premium pay or incentive-type program they were investigating. We had not decided definitely on what type of plan would be applied but we were definitely considering it.

Q. At the time of that meeting had the wage clause that appears in General Counsel's Exhibit No. 2, the contract introduced into evidence, had that wage clause been tentatively agreed to subject to agreement on the entire contract?

* * * *

Q. I am speaking about Article 17. Had that been agreed upon prior to the March 12 meeting?

A. Yes.

TRIAL EXAMINER: If I may interpose. Had it been reduced to writing or was it just an agreement?

THE WITNESS: It had been presented to the negotiating committee and, I believe, it had been reduced to writing.

* * * *

[fol. 80] Q. At the time you were discussing this proposed premium incentive plan which was being discussed but hadn't been specifically determined, were you alluding to or referring to or in any way contemplating the provisions of the wage clause that permitted this employer reserved rights?

A. Very definitely. We felt that with this clause that we would be permitted to pay premium rates such as we have finally adopted.

TRIAL EXAMINER: I believe, Mr. Thomason, if I understand Mr. Tichy's question correctly, he was driving at something slightly different. If he wasn't, then I would raise this question. Your testimony, your present recollection, is that the substance of Article 17 had already been agreed upon and probably, as you now recall, it, reduced to written form by the time of the March 12 meeting.

THE WITNESS: Yes.

TRIAL EXAMINER: Now, when, following this caucus you made these observations that you weren't too concerned about the glue spreader rates because you had this matter of a possible premium plan under consideration.

Did anyone on the management team at that time make any reference to the relationship between your plans and ideas about a premium paid plan and Article 17 in its then tentative form.

THE WITNESS: No, not to my recollection.

Q. (By Mr. Tichy) Now, you heard the testimony [fol. 81] with respect to June 7 and July 15 meetings, you were present at both, were you not?

A. Yes.

Q. And the subject of this premium pay arrangement for the glue spreader crew was discussed at each of these meetings?

A. Yes.

Q. What was the position of the Employer as explained to the union representatives in these two meetings?

A. Basically we explained to them we felt this was permissible under the Articles or under the agreement in Article 17.

Q. And did the union make any effort to your recollection to get into the mechanics of this premium pay plan?

A. None at all. We were only asked to discontinue the practice not to negotiate any changes or any parts of the premium pay clause or notice.

Q. What was the position of the company in concluding its dealing with this request of the union? What was the company's concluding response?

A. That the company felt that we they were within the rights of the agreement to pay this premium rate and we informed the union committee.

Q. You indicated, did you not, that you intended to continue the premium pay under that provision of the agreement?

A. That is true. We were asked specifically if we were going to and we informed them that we were.

[fol. 82] Q. In your negotiating this agreement with the union representatives, did you seek assistance from Mr. Bright?

A. Definitely, yes.

* * * *

Q. (By Mr. Tichy) Tell us who Mr. Bright is.

A. Mr. Bright is a representative of the Timber Products Manufacturers Association of Spokane and he is located in Missoula and he assisted our company in our negotiations and, as you say, he explained the many phrases and clauses in the agreements throughout the area.

Q. He was present at all the meetings?

A. Yes.

* * * *

[fol. 83] Q. And your firm is a member of the Timber Products Manufacturers Association?

A. Yes.

Q. And the association is an industrial and public relations association of timber producers in western Montana and in other locations?

A. Yes.

Q. Did Mr. Bright have any occasion to discuss with you the particular language that is found in Article 17, Paragraph (a)?

A. Mr. Bright informed me that this language was commonly used in other agreements. Now, I don't recall which ones but I also particularly advised Mr. Bright of what the company's policies had been prior to the negotiations with the union and what we desired in this agreement. Then, Mr. Bright in turn would phrase the different paragraphs and articles to negotiate what we desire.

Q. In discussing this particular Article, Paragraph (a) relating to wages, was other—were other premium pay or incentive plans discussed as existed in other locations under comprable language?

A. Yes.

Q. Do you recall specifically one or two that were mentioned, that was mentioned?

* * * *

[fol. 84] A. We were informed by Mr. Bright that Mount Lolo in Missoula was paying an incentive type plan under this same type of an agreement and also, I believe, Stoltze Lumber Company was.

Q. Didn't Mr. Bright in your presence discuss the Mount Lolo situation with Mr. Weller as the representative of the union in one of those meetings?

A. Yes.

[fol. 85] * * * *

CROSS EXAMINATION

Q. The quality of the stock that is presented to the glue spreader crews, does that greatly determine the speed with which they can perform?

A. Yes.

Q. Who determines the quality of the stock?

A. The Employer, the management people.

Q. If there were unskilled men on any given crew as a fill-in for a week, would it be possible for the crew remaining to make its bonus?

A. Yes.

Q. And at that point, the unskilled individual would participate in that?

A. That is true.

Q. And your classified wage scale provides a wage differential between your three categories on the glue spreading crew, the core layer, core turner, and core sheet layer, and that is based presumably on skill?

A. It is based pretty well on skill. We must recognize that these contractual rates were negotiated as being existent throughout the Montana industry, plywood industry. We base them a little differently. In fact, we indi-[fol. 86] cated this to the negotiating committee. We felt some of the rates should be a little closer together.

Q. You would recognize a differential on the skill on the glue spreader crew on these classified rates?

A. Yes.

Q. And as your plan, your premium plan, now applies —strike that.

You would agree, would you not, that the highest paid employee on the glue spreader crew is the core layer at $2.29 and the most skilled on the crew as a category?

A. That would be—no, I wouldn't, not necessarily. I would say his responsibilities are a little more but not

necessarily is his skill any greater and the core layer's skill is not any greater than the core feeder's skill at feeding core or the sheet turner's skill at turning sheets.

Q. Or is the aptitude or ability to effect the bonus system on the crew who has the greatest responsibility of, say, the core layer?

A. Not necessarily. I just completed telling you, possibly one man on the crew that was not experienced but displayed extra effort or exerted extra effort to keep up his end, could result in the other three men or the entire crew obtaining the volume but the special skill of the core layer would not necessarily be any more special.

Q. But he would have greater responsibility?

[fol. 87] A. This was taking into consideration when the contractual rates were negotiated, yes.

Q. So that if the crew makes the bonus for the week, then the person who has the greater responsibility receives the least benefits from the plan, is that correct?

A. They all received equally the same, yes.

Q. If the crew doesn't achieve the bonus because they decided they wanted to loaf for the week, he would receive $2.29, that is the core layer, would he not?

A. That is correct.

* * * *

Q. (By Mr. Stange) If there were someone who was receiving additional premium that had been negotiated between you and the individual over and above the classified wage rate because of his special skills that you would recognize, that too would disappear on this bonus plan?

[fol. 88] A. That is true.

* * * *

TRIAL EXAMINER: I have just one question. You have indicated in your direct examination that during these final meetings with the union representatives when they protested the premium pay plan that they made no effort to raise any questions with respect to the actual operations of the plan or to suggest any basis for complaint in regard to the details of the plan.

THE WITNESS: That is true.
TRIAL EXAMINER: But they objected to it in total?
THE WITNESS: That is right.

* * * *

CROSS-EXAMINATION

(By Mr. Weller)

[fol. 89] * * * *

Q. Referring to this March 12 meeting, I believe you testified following the caucus the union was told something about an incentive plan you had in mind.

A. Yes.

Q. Do you recall about what time of day that caucus was?

A. It was very close to the end of the meeting, towards the end of the meeting. I don't recall how long the meeting lasted. It would be difficult to determine the exact time, but I remember it was right at the end of the meeting and after there was more caucuses. This was—after this, why, we adjourned the meeting.

[fol. 92] * * * *

REDIRECT EXAMINATION

* * * *

[fol. 93] Q. (By Mr. Tichy) One thing I was referring to in your testimony, Mr. Thomason, as we went through what the glue feeder does and what the core layer and so forth, the stock that the sheet turner handles has to go over the head of the core layer, is that correct?

A. That is correct.

Q. So the core layer has got to be alert and skillful or he is going to get hit in the head by the sheets, isn't that true?

A. Yes, and also damage the sheet.

Q. And also the sheet turner has to be sure to get it up over his head or they are going to be fouling things up?

A. That is right.

Q. Now, the area in which you responded to counsel for the General Counsel on the quality of the stock coming to each glue spreader crew, did I understand you earlier to go into this matter of trying to average it out so each crew would be varied or have you already testified to this?

A. Yes, and this is what is done.

Q. So this area of the quality of the stock is normally equal between the crew during the course of a period of time?

A. Yes.

* * * *

RECROSS-EXAMINATION

Q. (By Mr. Stange) Who makes the decision for determining what crew gets which stock?

[fol. 94] A. The foreman.

* * * *

A. I have production records that are turned in each morning that from the previous day give me the type of panel that is produced on each spreader during the day and we make particular notice to be certain that each spreader gets their turn at the higher classified stock and grades.

Q. I am not talking about that particular problem. I am talking about the quality of the material that is coming to the individual. If it is short or the word used by Mr. Tichy, feathered or something like this. This wouldn't be reflected in the quality or the type of material they were running there on your records, would it?

A. Yes, it would.

Q. How?

A. Because different grades of materials take selected stocks and these selected stocks result in higher quality core binding and less chances for any tapering or broken [fol. 95] edges or defects to be involved in this particular panel production.

Q. But at the time they are coming through there are some quantities of the stock that are coming through, say, grade one finding plywood that are not as good as other quantities that come through.

A. Of grade one?

Q. Yes.
A. That is true, yes.
Q. And you record wouldn't reflect within the grade?
A. No.
Q. And who makes the decisions as to who gets the quality wood?
A. The foreman makes that decision.
Q. You wouldn't have any personal knowledge of how he makes his decision?
A. No.
Q. (By Mr. Tichy) Have you checked with the foreman to insure they are carrying out this promise in the May 20 letter which states that the company will do everything to help a crew in obtaining their quota?
A. Repeatedly.
Q. You have checked that?
A. Yes.
Q. So you are satisfied in your mind that there is a fair distribution?
A. As fair as possible, yes.

[fol. 96] * * * *

DIRECT EXAMINATION

Q. (By Mr. Tichy) Your name is Dexter Bright?
A. Yes.
Q. Your address?
A. Post Office Box 1478, Missoula, Montana.
Q. And your occupation?
A. I am staff member for Timber Products Manufacturers Association, probably more commonly called a fieldman due to the fact I do reside out of the general office and operate in pretty much of a given area, namely, Montana.
Q. And in the course of your duties, did you have any work that you did for and at the request of the C & C Plywood and Veneers Incorporated?
A. Yes, very definitely.
Q. And would you tell us what that work was?
A. Well, following the certification by the National Labor Relations Board of Local 2405 as the collective bargaining agent, of course, we had the task before us of

[fol. 97] negotiating the contract and Mr. Thomason of the company, I would say, utilized the experience that I had had in the area and knowledge of the other contracts to assist him in negotiating this contract and wage scale.

Q. You have negotiated contracts and wage scales in other plants, have you not, over the years?

A. Well, yes, particularly the initial contract where a company has not, at least in their present location as was the case with C & C, previously had a contract. Maybe as time goes on, I may not be so involved in succeeding contracts.

Q. You were present through all of the meetings that led up to this collective bargaining agreement in this situation?

A. Yes, I was present in all of the meetings.

Q. You were present in this hearing room since the hearing began, isn't that true?

A. Yes, that is true.

Q. And you heard Mr. Thomason's testimony with respect to his statements concerning a discussion of a proposed incentive or premium arrangement for glue spreader crews?

A. Yes. You asked me if I heard his testimony?

Q. Yes.

A. Yes, I have heard that testimony.

Q. Do you know of your own knowledge whether or not the union committee was present at the time of the discussion to which he testified?

[fol. 98] A. Yes, I do. It was the March 12 meeting and, of course, the conciliator moved back and forth between the parties as is their customary way and therefore the question arose in my own mind as to whether or not the union committee was in the room at the time. I have clearly and uniquivocally a recollection of Mr. Thomason talking about putting an incentive plan into effect so I wanted to satisfy myself on the basis of recollection and past records of the meetings as to exactly what happened. I have those original minutes which I don't want to refer to without the permission of the Trial Examiner but they show, if I may go on, they show that the company was caucusing with Mr. Carl Clavadetscher,

the Commissioner of Concilliation. My custom is to mark a joint meeting beginning at the end of a caucus at a certain time when we go back together at a joint meeting for our own records which usually are never transcribed or anything.

Well, then, the minutes show that after this private caucus that Mr. Clavadetscher called the union committee back with us so we had a joint meeting just prior to the recess of the meeting and my minutes show we recessed at 5:10 p.m. We started at 3 p.m. and we were only together, that is, the two committees representing the company and the union, in joint meeting for about 15 or 20 minutes and it was during that period of time that Mr. Thomason made a statement with regard to the pay for these glue spreader crews that the company was working on an incentive or bonus or premium system—I don't [fol. 99] remember the exact wording that he used—to better compensate these people on the basis of their abilities and there was no discussion of the specifics of the plan as to what it would be and my recollection without being asked the question by counsel is I don't remember any comment about it at all from the union committee. They didn't say they opposed it or accepted it and there was no discussion about what the plan would contain.

TRIAL EXAMINER: Mr. Bright, I take it from the general tenor of Mr. Tichy's examination prior to your last response that it would be interesting to determine your present recollection as to whether or when this subject came up during this final joint meeting on March 12 in addition to saying the company had this in mind, was any reference made in the presence of union committee to the fact that what the company had in mind was something similar to what was being done at certain named other companies?

THE WITNESS: Well, the certain other named companies were not plywood companies and without belaboring the point, there are not many plywood plants in Montana. Two of the ones I used as a basis for advising to the best of my ability Mr. Thomason on the question which he raised were not plywood producers. One was the Mount Lolo Lumber Company and what had happened

there and the reason I advised Mr. Thomason as I did, namely, to the effect that I thought he had under the contract the privilege of doing what he was contemplating [fol. 100] doing. This is what happened. The late Paul Delaney of the Mount Lolo Lumber Company, proposed to put into effect in his operation a separate per thousand basis of payment for car loader rates from footage one. He called me up. He said, I propose to do this and I propose to let a contract, to let a contract, was the way he put it, to two of his car loaders, who are his top loaders, a man named Max Granmo and Max Drake or Dick Johnson. I am not sure which because the names are so similar but that is what he proposed to do. We had a contract with the local and we had negotiated an hourly rate for car loaders and I advised Mr. Delaney I didn't think he would be within his right to do that. He said, "I want some kind of an incentive. How can I do it?" The union agent which happened to be a Mr. Warren Cork who represents the local, that particular local there in Missoula, and had objected to the company doing that and I told him, "I didn't think he would have a true independent contractor relationship." It was actually a legal problem but I felt on the basis of laymen's experience in bargaining and so on, we wouldn't be justified in doing that. He said, "How can I set up an incentive system to the best of my ability?" The only way, I told him, you can do it is set a norm which he did, 40,000 feet, and he said: Will you work out a formula for me so if I pay a given amount, X cents per thousand for all lumber loaded above 40,000 feet in a day that I arrive at about the same amount of money as the dollar fifteen cents per thousand straight that I proposed to pay." So [fol. 101] I did that, and he ended up with setting the 40,000 feet norm for 8 hours and no overtime to be worked because of high earnings. He wanted to avoid that and to pay 80 cents per thousand to each man for each thousand feet loaded in excess of 40,000 feet in eight hours to be computed on a daily basis. It so happened that in that instance I reduced that all to writing which might not always happen but the company has the original and I have the copy in my files in Missoula. I wrote

this entire matter up and laid it out to the company as to what I thought they could do of they guaranteed the hourly rate. At no time should they pay less than the hourly rate but for over and above this norm that they could reward for the extra work and my basis for that was in the wage clause there is a very similar language to what we have involved here with the execption that that contract language did not permit the elimination of a premium once given to the man receiving it that if you replace the man with a new man and you felt he did not exemplify the same merit and abililty, efficiency, and so on he would not necessarily get it but so long as the present man stayed on the job, he would continue to get the premium. Other than that, they were similar.

TRIAL EXAMINER: In effect that experience that you have just described with respect to Mount Lolo had been pretty well explained to Mr. Thomason?

THE WITNESS: In extreme detail.

[fol. 102] TRIAL EXAMINER: Now, the immediate question is on March 12 when Mr. Thomason or rather after the conciliator had called you all back together at a joint meeting, sometime shortly before 5:10 p.m. a reference was made to C & C Plywood giving some consideration to a premium pay plan, was the name of Mount Lolo mentioned by anyone, you, or Mr. Thomason?

THE WITNESS: My recollection will not permit me to say, Mr. Trial Examiner, that it was at that meeting because I don't recall that but at some meeting during this series of meetings, Mount Lolo was mentioned in connection with the payment of a premium rate based on production. I remember very clearly because Mr. Weller's response was very brief. He was acting as the chief spokesman and his response, as I recall, was very brief and he made some comment about it was something that was in effect for a long time or before the union contract or something like that. I don't remember exactly what he said so we didn't debate the Mount Lolo thing with the union but it was mentioned in one meeting at which the union was present.

TRIAL EXAMINER: I have nothing further.

Q. (By Mr. Tichy) Mr. Bright, is it customary for you to keep notes of these meetings in which you attend either as a spokesman or co-negotiator?

A. Oh, yes, very definitely. In fact, I never destroy them and I have minutes on all 11 of the C & C Plywood meetings.

Q. Are those minutes, as you call them, reduced to [fol. 103] writing at the meeting or is this something you wait until you get back to your office and write up?

A. Oh, no, they pretty well speak for themselves—the scribble. They are written at the time. They are very seldom transcribed. One company over the years wanted them transcribed but other than that, we never transcribe them. We leave them in the original form.

Q. Do you have in your possession the minutes of the meeting of March 12, 1963?

A. Yes.

Q. At this time I would ask you to read that portion of your minutes exactly as you have it there beginning with Mr. Clavadetscher coming to the—

* * * *

A. I should comment that this meeting started at 3 p.m. in the company's office. It was recessed at 5:10 p.m. My notes consist of three pages of longhand penciled notes. At the top of page 3 it says "Company caucus ended 4:45 p.m. Clavadetscher went back to union at 5 p.m. Union and company jointly 5 p.m. Clavadetscher: Union will recommend a dated union shop and make a [fol. 104] provision for students and incorporate present rates in effect on spreader crews."

"Company position unchanged. Company is working on an incentive plan for spreader crews under premium clause."

"Weller was insistent on union shop. Meeting recessed subject to call of either party through F.M.&C.S. or by call of FM&CS." I don't know why I repeated. "Recessed 5:10 p.m."

* * * *

MR. TICHY: At this time, Mr. Trial Examiner, I would propose to stipulate that during the period testified to by Mr. Bright, the following clause appeared and con-

tinued to appear in the collective bargaining agreement of the Mount Lolo Lumber Company, Inc., Missoula, Montana, and Local Union No. 2685, Lumber and Sawmill Workers, AFL-CIO. The clause reads as follows:

"Nothing in this agreement shall be construed as to prevent the employer from voluntarily advancing any wage rate or scale; but the advance of any individual rate or scale to reward a particular employee for some special [fol. 105] fitness, skill, aptitude, or the like, shall not be considered a permanent increase in the rate or scale of that position after it has been vacated by a particular individual to whom the increase was granted."

MR. STANGE: May I ask what the materiality is, what are we getting at here so we can save some time?

MR. TICHY: To indicate the clause there used comparable language to the clause here and that further, we have for all practical purposes a synonymous situation in the Mount Lolo Company except you have a lumber mill and here a plywood plant.

MR. STANGE: I don't think that, if, for example, that was a violation, if it is a violation here and a violation there and nobody did anything in that instance, it has any bearing on this particular situation. The question is whether there is a violation under the terms of this agreement and based upon the bargaining history whether there is a violation of Section 8(a)(5). I don't see why we need get into that.

MR. TICHY: This language is common to several contracts in western Montana. It is comparable, not identical, and this is going on in other plants so there is every reason to assume the parties, Mr. Weller is a party to all of these contracts, understanding this. So why are we faced with an unfair labor practice situation in a condition that occurs elsewhere.

[fol. 106] * * * * *

MR. TICHY: Do you stipulate to this statement I put in in regard to or concerning this clause being in existence during the period discussed by Mr. Bright?

MR. STANGE: I will so stipulate.

TRIAL EXAMINER: The stipulation is noted.

Q. (By Mr. Tichy) With respect to this Mount Lolo situation, these car loading crews are made up of how many individuals or employees?

A. Each crew is made up of two employees. There are always at least one crew, often two crews, and occasionally three crews in that particular instance. As a result this is a situation in which it is, you might say, the crew effort that gets the premium at Mount Lolo.

A. Two men have to work together in order to load the lumber.

Q. Then, I believe Mr. Thomason also testified you advised him about the Stoltze Lumber Company comparable situation?

A. Well, yes, there involving only one employee, that is, to my knowledge. There was a similar situation there where the company pays 25 cents an hour premium to the head sawyer in the sawmill if they exceeded 80,000 feet cut per day on a monthly basis and, of course, there [fol. 107] again it is done, at least the company feels it is done, on the basis of their wage clause and payment of a premium to the sawyer. I realize ordinarily the witness answers to the question put to him but there is one probably important thing on this Mount Lolo thing I didn't get finished with, if you are interested in it.

TRIAL EXAMINER: I don't think I am really.

MR. STANGE: I will object. This is getting on and on and I fail to see the relevance.

TRIAL EXAMINER: The only thing that interested me in relation to the Mount Lolo situation was whether there is any indication that a change in the nature of a premium rate plan was installed in Mount Lolo following the adoption of a change with comparative language. Mr. Tichy has covered that. What the weight of that will be in my determination of this particular, I am expressing no opinion now but I saw a possible basis for considering that to be relevant. The details of the Mount Lolo situation I permitted you to expand because in the process of giving us the details you gave us the relevant material, but a lot of the details is of little materiality with the problem now in this proceeding.

THE WITNESS: I don't want to say it on the record,

but I cleared that with the union. That is the thing I didn't get out in my testimony.

Q. (By Mr. Tichy) The union acquiesced?

A. I have definitely cleared that transaction with Warren Cork.

[fol. 108] * * * * *

Q. (By Mr. Tichy) Turn now to the meeting of June 7 and July 15, 1963. You were present when Mr. Thomason testified. Do you concur in his testimony or do you have any different or additional statement to make?

A. No, I concur generally. I realize no two people see the thing identically but I concur generally in Mr. Thomason's testimony, particularly, with regard to the fact that the union came in in effect saying that the company didn't have the right to do what they did with regard to this incentive program under the terms of the contract and we expressed to the union why we thought the company did have the right and the union did not propose any alternative except to discontinue it and they didn't ask us to discontinue it.

* * * * *

MR. TICHY: At this time the Employer would pro-
[fol. 109] pose a stipulation that the collective bargaining agreement existing between the Stoltze Lumber Company at Columbia Falls, Montana, and Local No. 2797 of the Lumber and Sawmill Workers, AFL-CIO contains the following provision:

"Nothing in this agreement shall be construed as to prevent the Employer from paying a premium rate in excess of the agreed upon minimum scale to reward special fitness, skill, aptitude, or the like."

I further propose this stipulation read that that provision has been in existence at Stoltze Land and Lumber Company for at least three years, conceivably longer and that it has a bearing with regard to Mr. Bright's testimony on the special arrangement at Stoltze Land and Lumber Company.

TRIAL EXAMINER: I take it on the basis of our discussion off the record, Mr. Stange, that you would

press the same point with respect to the immateriality or irrelevance of this matter?

MR. STANGE: Yes.

TRIAL EXAMINER: On the basis of the representations which I made and the observations which I made when the point was raised with respect to the Mount Lolo contract, I am going consistently to rule that that particular matter covered by the stipulation is sufficiently relevant and material to warrant its receipt for the record and if that is the only basis of your objection, I would [fol. 110] note the stipulation for the record and overrule that objection.

MR. TICHY: At this time, Mr. Trial Examiner, we wish to ask you to take judicial notice of the definitions of the following four words and we encourage the use of the large Webster's unabridged Merriam dictionary. The words are "premium", "aptitude", "skill", and "fitness".

TRIAL EXAMINER: Without at the moment knowing precisely what I will discover, I will state for the record that I propose to consult the dictionary with respect to these words.

* * * *

MR. TICHY: At this time may it please the Hearing Officer, the Employer wishes to renew its motion to dismiss, feeling now that the additional evidence adduced clarified any conceivable omissions that may have existed in General Counsel's case to establish the Employer's motion and the Employer will rest.

TRIAL EXAMINER: Very well. I am going to reserve ruling on the motion. * * *

* * * *

[fol. 113]

GENERAL COUNSEL EXHIBIT No. 2

Plywood, Lumber & Sawmill Workers
Local Union No. 2405
United Brotherhood of Carpenters
and Joiners of America, AFL-CIO
Kalispell, Montana

C & C Plywood Corporation
Kalispell, Montana And
Veneers, Inc.
Kalispell, Montana

WORKING AGREEMENT

Whereas, the parties hereto desire to establish the conditions under which employees shall work for the Employer during the term of this Agreement, and desire to regulate the mutual relations between the parties hereto. Now, therefore, this Agreement entered into this 1st day of May, 1963, by the C & C Plywood Corporation, and Veneers, Inc., both of Kalispell, Montana, hereinafter called the Employer by its authorized agents and Plywood, Lumber and Sawmill Workers Local Union No. 2405, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, also of Kalispell, Montana, hereinafter called the Union, by its authorized agents, Witnesseth, that in consideration of the mutual promises made in good faith by both parties to this Agreement, they do hereby agree with each other, to-wit:

Article I

UNION RECOGNITION

The Employer agrees to deal with and recognize the Union as the sole collective bargaining agency with respect to wages, hours, and other terms and conditions of employment for all production and maintenance employees of the Employer at its veneer and plywood plants near Kalispell, Montana, excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

Article II

UNION MEMBERSHIP

A. Present employees who pay monthly Union dues to Local No. 2405 for the month of May, 1963, shall as a condition of continued employment continue to tender the periodic membership dues during the term of this Working Agreement.

B. New employees hired after date of execution of this Working Agreement shall have the privilege of joining or not joining the Union during the term of this Agreement shall, as a condition of continued employment, continue to tender the periodic membership dues during the term of this Working Agreement.

C. It is mutually agreed that in no instance shall employees who have voluntarily joined the Union and who therefore are required by this Article to maintain Union membership as a condition of continued employment, be required to continue Union membership at an earlier date than on or after the thirtieth (30th) day following date of their most recent employment by the Employer, or the effective date of this Agreement, whichever is the later, and such employees may be required to tender only the periodic dues uniformly required as a condition of retaining membership in the Union.

[fol. 114] D. The Union may request the Employer to discharge an employee for failure to maintain membership dues as provided in this Article, except that no discharge shall be requested where the employee has failed to pay his dues for a period of six (6) calendar months or more. All such requests to the Employer shall be in writing, with a copy served on the employee and shall include written evidence offered in support thereof. Within fifteen (15) days after receipt by both the Employer and employee of such requests, and after the Employer has held a hearing if requested by the affected employee, the Employer shall determine and in writing notify the employee and the Union of its findings. If such findings be adverse to the employee he shall thereupon be discharged effective as of the commencement of his next shift.

E. The Union shall indemnify and waive the Employer harmless against any and all claims, demands, suits, or other forms of liability that shall arise out of or by reason of action taken or not taken by the Employer at the request of the Union for the purpose of complying with any of the provisions of this Article.

Article III

HIRE AND DISCHARGE

A. The Employer shall have the sole and exclusive right to hire, discipline, suspend or discharge any employee. All new employees shall be hired on a trial basis for a period which shall consist of sixty (60) days actually worked by the employee, either continuously or with intervals between. During said trial period, the Employer shall have the sole right to discharge such new employee.

B. After sixty (60) cays of actual work as above referred to, in event that an employee shall be suspended or discharged from his employment and he believes that he has been unjustly dealt with, such suspension or discharge shall remain effective, but shall constitute a case to be handled in accordance with the terms of Article V—Grievances. Such grievance shall be taken up with the Employer within two (2) working days from the date of suspension or discharge or shall be considered waived. If upon consideration of the matter by the Employer and Union it is agreed that an employee was unjustly suspended or discharged and should be reinstated, such reinstatement shall be in accordance with the terms of settlement arrived at between the Employer and Union.

Article IV

SHOP COMMITTEE

A. The Union members in the employ of the Employer shall select a committee consisting of four (4) employees to be Shop Committeemen and Shop Stewards, with two (2) of these committeemen to be employees of C & C Plywood Dorporation and two (2) of these committeemen to be employees of Veneers, Inc., and the committeemen

to represent employees in the respective plant in which they work. To be eligible for membership on the Shop Committee a person must be a citizen of the United States, must be and remain employed by the Employer and must [fol. 115] have been so employed for at least one (1) year immediately prior to his selection as a member of the Shop Committee. The shop committee shall represent the Union in all matters affecting the performance and administration of this Working Agreement, with the understanding that one (1) committeeman from each plant on the day shift and the swing shift for a total of four (4) committeemen, when the plant is operating a day and swing shift, shall be designated as Shop Stewards. The Union agrees to keep the Employer informed at all times as to the names and addresses of employees serving as Shop Committeemen and Stewards.

B. The Union agrees to also keep the Employer informed at all times as to the names and addresses of the President, Vice President, Recording Secretary and Business Representative of LSW Local No. 2405.

Article V

GRIEVANCES

A. Should there be any dispute or grievance arise under this Agreement, it shall be handled in the following manner:

(1) The employee or employees concerned shall continue to work, except in the case of suspension or discharge. The dispute or grievance shall first be taken up with the Plant Superintendent by the Shop Steward. If no settlement is reached within seventy-two (72) hours, the grievance shall then be taken to higher management of the Employer, by the Shop Steward and/or the Plant Superintendent for settlement, at which time the Union may call in its Business and/or Union Representative(s). If a satisfactory settlement is reached between the Shop Steward and Plant Superintendent or higher management, such settlement shall be binding on all parties concerned. Unless such grievance, dispute or complaint is presented

to the Plant Superintendent within three (3) working days after it arises it shall be waived.

(2) Any issue, grievance or dispute arising under this Working Agreement which is not settled at the expiration of ninety (90) calendar days following the date upon which such issue, grievance or dispute arises shall be considered waived and nullified.

Article VI

STRIKES AND LOCKOUTS

A. During the life of this Agreement, no strike shall be authorized or caused by the Union or sanctioned by the employees of the Employer or members of the Union, and no lockout shall be ordered by the Employer until every peaceable method of settlement of the difficulties have been tried, including compliance with the provisions of Article V—Grievances and the Federal Mediation and Concilation Service has been called in and has attempted to settle the dispute and failed to do so. No strike shall be called until approval is registered by secret ballot of a majority of the Union members then currently on the payroll, the Union has certified in writing the results of the balloting to the Employer, and the Employer has been notified in writing at least ten (10) days in advance of the effective date advising the date on which the strike is to start.

[fol. 116] B. In the event that a work stoppage unauthorized by the Union occurs within the operations covered by this Agreement the employees responsible therefore may be discharged forthwith by the Employer without protest and/or recourse by the Union and the latter shall in no way be deemed responsible for such unauthorized stoppage. The Union agrees that it will not sanction or recognize "stranger" (not an employee) and/or jurisdictional pickets, and/or strikes affecting the Employer and/or employees of the Employer.

C. The parties recognize that in the event of any work stoppage it is essential for the interests of both the parties that damage and loss be minimized so that, at the

conclusion of the stoppage, full employment and full production will not be delayed and therefore it is agreed that before and during such stoppage:

(1) Machinery, materials and equipment must be prepared for idleness, and products produced before the work stoppage must be protected against deterioration.

(2) Plant, machinery, materials, equipment and property must be adequately guarded and protected. The Union agrees not to interfere with the Employer's activities in carrying out these intents and purposes and agrees to allow sufficient employees selected by the Employer and/or such other personnel as selected by the Employer to carry out said intents and purposes.

Article VII

UNION ACTIVITIES

There shall be no discrimination against employees because of their Union activities. There shall, however, be no Union activities, either for or against, during working hours, except that the Shop Steward may attend to complaints reported to him, provided normal operation and efficiency of the plant is not interfered with.

Article VIII

HOURS OF LABOR

[fol. 117] • • • •

Article IX

HOLIDAYS

[fol. 119] • • • •

Article X

CALL TIME AND LOST TIME

• • • •

Article XI

CLASSIFICATION OF EMPLOYEES

[fol. 120] * * * * *

Article XIII

PROMOTION AND FILLING HIGHER VACANCIES

In filling vacancies in the higher classifications, promotions shall be based upon ability, efficiency, experience and seniority. Ability, efficiency, and experience being sufficient, seniority shall prevail, the Employer to be the judge, subject to the provisions of Article V—Grievances.

Article XIII

SENIORITY

* * * *

[fol. 122] **Article XIV**

LEAVES OF ABSENCE

* * * *

Article XV

SAFETY COMMITTEE

* * * *

Article XVI

VACATIONS

[fol. 124] * * * *

Article XVII

WAGES

A. A classified wage scale has been agreed upon by the Employer and Union, and has been signed by the parties and thereby made a part of the written agreement. The Employer reserves the right to pay a premium rate

over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like. The payment of such a premium rate shall not be considered a permanent increase in the rate of that position and may, at sole option of the Employer, be reduced to the contractual rate at such time as the Employer feels that the employee no longer merits the premium, except that no present employee on the date of signing of this original Working Agreement shall suffer a wage reduction as a result of this Agreement.

B. It is mutually agreed that the attached classified wage scale shall be effective upon the signing of this Working Agreement with wages closed for the term of that agreement. Such wage closing shall not be considered so as to prevent negotiations to establish applicable rates for new job classifications or to adjust rates for job classifications on which the Employer and Union agree there is a substantial change in job content following the date of this Agreement.

Article XVIII

HEALTH AN WELFARE

[fol. 125] • • • •

Article XIX

WAIVER OF DUTY TO BARGAIN

The parties acknowledge that during negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter of collective bargaining, and that the understanding and agreements arrived at [fol. 126] by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agree that the other shall not be obligated to

bargain collectively with respect to any subject matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

Article XX

UNION BULLETIN BOARD

* * * *

Article XXI

TERMINATION

A. This Agreement when signed by the qualified representatives of both parties shall remain in full force and effect to (but not including) November 1, 1968, and from year to year thereafter, until either party notifies the other in writing of a desire to change, modify or terminate this Agreement at least sixty (60) days prior to November 1, stating the changes desired.

In Witness Whereof, the parties hereto acting by and through their duly authorized officials and representatives have executed this Agreement this 1st day of May, 1968, at Kalispell, Montana.

Plywood & Lumber & Sawmill Workers
Local Union No. 2405, United Brotherhood of Carpenters & Joiners of America

By /s/ HARRY S. HUNT
President

By /s/ JOHN R. WILLIAMSON
Recording Secretary

By /s/ AUGUST F. STEINER
Committeeman

By /s/ MORTON L. HOYE
Committeeman

By /s/ JACK CORNELL TAYLOR
Committeeman

Montana Carpenters District Council
Lumber & Sawmill Workers

By .....
Executive Secretary

C & C Plywood Corporation
Kalispell, Montana

By /s/ C. O. THOMASON
General Manager

By /s/ R. W. ELLENBURG
Witness

Veneers, Inc.
Kalispell, Montana

By /s/ C. O. THOMASON
General Manager

By /s/ R. W. ELLENBURG
Witness

[fol. 127] CLASSIFIED WAGE SCALE

The undersigned parties hereto agree that the contractual wage scale as referred to in Article XVII—Wages of the Working Agreement in effect between them, is as follows:

C & C PLYWOOD CORP.

JOB CLASSIFICATION	RATE PER HOUR
Dryer Feeder	$2.00
Dryer Grader	2.12
Tape Machine Operator	2.07
Tape Machine Off-Bearer	2.00
Core Feeder	2.24
Core Layer (2)	2.29
Sheet Turner	2.15
Cold Press Operator	2.17
Glue Mixer	2.07
Skinner Saw Breaker	2.00
Skinner Saw Feeder	2.12
Cut-Off Saw Feeder	2.08
Panel Grader	2.12
Panel Patcher & Grader	2.07
Sander Feeder	2.02
Sander Grader	2.12
Jitney Driver	2.07
Clip Saw Operator	2.05
Clip Saw Off-Bearer	2.00
Cleanup & Watchman	2.00
Jointer Operator	2.07
Car Loader	2.12
Raimann Machine Operator	2.02
Glue Cleanup	2.00
Millwright	2.475
Carpenter	2.475
Electrician	2.525
Training Period Sixty (60) Days	1.87

A night shift wage differential of three (03) cents and five (05) cents per hour in addition to the contractual rates shown herein shall be paid to employees on the swing (second) shift and graveyard (third) shift respectively * * *

* * * *

[fol. 128] Wages are closed for the term of the Working Agreement of which this is a part, subject to opening

in the same manner as provided in Article XXI—Termination of the Working Agreement.

* * * *

[fol. 129] CLASSIFIED WAGE SCALE

The undersigned parties hereto agree that the contractual wage scale as referred to in Article XVII—Wages of the Working Agreement in effect between them, is as follows:

VENEERS, INC.

JOB CLASSIFICATION	RATE PER HOUR
Log Lift Truck	$2.27
Vat Jitney	2.17
Block Sawyer	2.15
Barker Operator	2.22
8' Lathe Spotter	2.07
8' Lathe Operator	2.52
8' Clipper Operator	2.17
Green Chain Grader	2.05
4' Deck Saw	2.02
4' Lathe Spotter	2.00
4' Lathe Operator	2.40
4' Clipper Operator	2.15
Green Chain Off-Bearer	2.02
Boiler Fireman	2.07
Jitney Driver	2.07
Cleanup & Watchman	2.00
Millwright	2.475
Carpenter	2.475
Electrician	2.525
Knife Grinderman	2.22
Training Period Sixty (60) Days	1.87

A night shift wage differential of three (03) cents and five (05) cent per hour in addition to the contractual rates shown herein shall be paid to employees on the swing (second) shift and graveyard (third) shift respectively * * *

* * * *

* * * *

[fol. 181] GENERAL COUNSEL EXHIBIT No. 3

C & C PLYWOOD CORP.

May 20, 1963

GLUE SPREADER CREW PREMIUM PAY

This premium pay schedule will be tried for the next couple of months to determine how it will work for all concerned.

Core feeders, core layers, and sheet turners only will benefit from this premium pay.

The conditions are, as follows:

(1) The footage will be computed on a pay-period time basis (every two weeks).

(2) Every member of the spreader crew will receive $2.50 per hour if footage is achieved.

(3) This rate will apply to over-time also, but only to the time worked on the spreader.

(4) The cold press spreaders must average 7,500′ core-line basis per hour.

(5) Hot press three-man crew must average 3,750′ core-line basis per hour.

(6) Smoke-times must be considered as time worked.

(7) Rejects must remain at 5% or less for the period.

(8) The Company will do everything possible to assist the crews in obtaining this footage by dividing the stock as evenly as possible, however, the foremen will make all stock decisions.

(9) A complete report of the footage averages and reject percentages will be posted at the end of the payroll period.

[fol. 132] GENERAL COUNSEL EXHIBIT No. 4

CARPENTERS LOCAL UNION NO. 2405

(PLYWOOD, LUMBER AND SAWMILL WORKERS)

United Brotherhood of Carpenters and Joiners of America
AFL-CIO

Kalispell, Montana

Kalispell, Montana
P. O. Box 201

May 27, 1963

Mr. C. O. Thomason, General Manager
C & C Plywood Corp. and Veneers Inc.
Route 1, Sunset Drive
Kalispell, Montana

Dear Mr. Thomason:

Pursuant to Article IV of the Working Agreement, this is to advise that the President of Local 2405 is Harry S. Hunt, Route 3, Kalispell, Montana; the Vice President is E. J. Deney, 1310-5th Avenue East, Kalispell, Montana; the Recording Secretary is John R. Williamson, P. O. Box 201, Kalispell, Montana, and the Business Representative is the writer, P. O. Box 201, Kalispell, Montana.

The Shop Committee is, as previously, Morton L. Hoye, August Steiner and Jack C. Taylor.

This is also to request a meeting with your representatives for the purpose of discussing your notice of May 20, 1963, headed "Glue Spreader Crew Premium Pay." We do not consider this to be premium pay within the meaning of Article XVII, but rather a change in wages made dependent upon a production basis rather than hourly rates agreed upon with the Union. As a matter of fact while we are perfectly willing to discuss increasing the hourly rates, or to the companies putting into effect premium hourly rates, we do not consider the subject of production bonuses, or wage rates based upon production standards, to be properly open for negotiations at this time.

Looking forward to meeting with your representatives at the earliest possible time.

Very truly yours,

/s/ Robert C. Weller
ROBERT C. WELLER, Business Representative
Carpenters Local Union 2406
(Plywood, Lumber and Sawmill Workers)

RCW:ar

cc: Dexter Bright

[fol. 188] GENERAL COUNSEL EXHIBIT No. 5

PLYWOOD CORP.

PLYWOOD MANUFACTURING

Route 1—Sunset Drive—Phone 756-5024—
Kalispell, Montana

May 31, 1963

RECEIVED
JUN 1 - 1963
Mont. Dist. Council
L. & S. W.

Carpenters Local Union No. 2405
P. O. Box 201
Kalispell, Montana

Attn: Mr. Robert C. Weller
Business Representative

Genlemen:

We acknowledge receipt of your letter dated May 27, advising us of the officers and shop committee of Local 2405.

With regard to your request for a meeting for the purpose of discussing our May 28th notice relative to the glue spreader crew premium pay, we wish to advise you that we can meet on Friday, June 7, at 3:00 P.M. at the Company office. Please advise, by return mail, if this date will be satisfactory.

Very truly yours,

C & C PLYWOOD CORP.

/s/ C. O. Thomason
C. O. THOMASON
General Manager

CCT: lps

[fol. 184] GENERAL COUNSEL EXHIBIT No. 6

MONTANA CARPENTERS DISTRICT COUNCIL
(LUMBER AND SAWMILL WORKERS)

United Brotherhood of Carpenters and Joiners of America
AFL-CIO

June 11, 1968

C & C Plywood Corporation
and
Veneers, Inc.
Route 1, Sunset Drive
Kalispell, Montana

ATTENTION: Mr. C. O. Thomason

Gentlemen:

It is our understanding you were to be notified in writing of our position on certain grievances that were discussed with you Friday, June 7, by Allie Cole and members of the Plant Committee.

It remains our position that Lloyd Bernardi was, and is, entitled to vacation with pay June 1, 1968, or any date later than June 1, 1963, to and including December 15, 1963. This would not be true of all employees, but we are informed that Mr. Bernardi had attained 8 years of continuous employment by June 1, 1963, and therefore, the date of his vacation could be any date beginning June 1 and ending December 15, 1963. There is nothing in the contract that gives the employer the right to arbitrarily select the date of any employees vacation. The contract does provide the employer the option of granting pay in lieu of the second week. However, the termination of Mr. Bernardi's employment obviously voided that option.

In order to keep the record clear we do not consider the unilateral changing of agreed upon hourly wage rates to a method of computing wages by a different method to be

proper either under the contract or under statutes regulating collective bargaining relationships, and we further object to the adjusting of employees grievances under the contract or the discussions of employee grievances without a representative of Local 2405 being given the opportunity to be present.

It appears that a further meeting, or meetings, will be necessary to discuss these items and we will attempt to comply with any suggestion you might have for the time and place of such a meeting.

Very truly yours,

ROBERT C. WELLER, Executive Secretary
Montana Carpenter's District Council
Representing Local Union 2405

RCW: ar

cc: Dexter Bright
Local Union 2405

[fol. 135] EMPLOYEE'S EXHIBIT No. 1

PREMIUM PAY
Tabulation by Crews
C & C Plywood Corp.

PERIOD AFTER INAUGURATION OF PLAN

Week of	Day #1 4 Men	Day #2 4 Men	Day #3 4 Men	Day #4 No. Men	Swg #1 4 Men	Swg #2 4 Men	Swg #3 4 Men	Swg #4 No. Men
5/20/63	Yes	No	No	Yes 3	No	No	No	No 3
6/10/63	Yes	Yes	No	No 3	No	No	No	No 3
6/17/63	Yes	Yes	No	No 3	No	No	No	No 3
6/24/63	Yes	No	No	No 3	Yes	No	No	No 3
7/ 1/63	Yes	No	No	No 4	Yes	No	No	No 4
7/ 8/63	Yes	Yes	Yes	Yes 4	No	Yes	Yes	No 4
7/15/63	Yes	Yes	Yes	Yes 4	Yes	No	No	No 4
7/22/63	Yes	Yes	No	Yes 4	No	No	No	No 4
7/29/63	Yes	Yes	Yes	No 4	Yes	No	No	No 4
8/ 5/63	Yes	Yes	No	Yes 4	No	No	No	No 4
8/12/63	No	No	No	No 4	No	No	No	Yes 4
8/19/63	Yes	Yes	Yes	Yes 4	Yes	No	No	No 4
8/26/63	Yes	Yes	No	Yes 4	Yes	No	No	No 4
9/ 2/63	No	Yes	No	Yes 4	No	No	No	No 4
9/ 9/63	No	No	No	Yes 4	No	No	No	Yes 4
9/16/63	No	No	No	Yes 4	No	No	No	Yes 4
9/23/63	No	Yes	No	Yes 4	No	No	No	No 4
9/30/63	No	Yes	No	Yes 4	No	No	No	No 4
10/ 7/63	No	Yes	No	Yes 4	Yes	No	No	Yes 4

Yes=34%

PERIOD PRIOR TO START OF PREMIUM PAY

Week of	Day #1 4 Men	Day #2 4 Men	Day #3 4 Men	Day #4 No. Men	Swg #1 4 Men	Swg #2 4 Men	Swg #3 4 Men	Swg #4 No. Men
4/ 1/63	Yes	No	No	No 3	No	No		No 3
4/ 8/63	No	No	No	No 3	No	No		No 3
4/15/63	Yes	No	No	No 3	No	No		No 3
4/22/63	No	No	No	No 3	No	No		No 3
4/29/63	No	No	No	No 3	No	No		No 3
5/ 6/63	No	No	No	No 3	No	No		No 3
5/13/63	Yes	No	No	No 3	No	No	Yes	No 3

Yes=8%

[fol. 186]

BEFORE
THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

C & C PLYWOOD CORPORATION
and
PLYWOOD, LUMBER AND SAWMILL WORKERS
LOCAL UNION NO. 2405, AFL-CIO

Case No. 19-CA-2686

Mr. Robert F. Stange, Seattle, Wash., for the General Counsel.

Mr. George J. Tichy, Spokane, Wash., for Respondent.

Mr. Robert C. Weller, Kalispell, Mont., for the Union.

Before: *Maurice M. Miller*, Trial Examiner.

TRIAL EXAMINER'S DECISION—Jan. 3, 1964

Statement of the Case

Upon a charge duly filed and served July 31, 1963, the General Counsel of the National Labor Relations Board caused a Complaint and Notice of Hearing to be issued and served upon C & C Plywood Corporation, designated as Respondent in this report. The Complaint was issued September 18, 1963; therein Respondent was charged with unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended. 61 Stat. 136, 73 Stat. 519. Thereafter, with an answer duly filed, Respondent conceded certain factual allegations set forth within the Complaint, but denied the commission of any unfair labor practice.

Pursuant to notice, a hearing with respect to the issues was held at Kalispell, Montana, on October 16, 1963, be-

fore me. The General Counsel and Respondent were represented by counsel; the Charging Party was represented by its business representative. Each party was afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. Before any testimony was heard, General Counsel's motion to amend the complaint with respect to certain minor textual matters was granted. When General Counsel's presentation was complete, Respondent moved for dismissal of the complaint, the motion was denied. When the record was complete, Respondent's counsel renewed his motion; disposition of the matter was reserved for this report. Since the hearing's close, briefs have been filed in behalf of the General Counsel, Respondent, and the Charging Party. These have been duly considered.

FINDINGS OF FACT

Upon the entire testimonal record, documentary evidence received, and my observation of the witnesses, I make the following findings of fact:

[fol. 137] I. The Business of Respondent

Respondent, though an Oregon corporation, maintains its principal place of business in Kalispell, Montana, where it is engaged in processing and manufacturing plywood from green veneer. During the twelve-month period preceding the Complaint's issuance, Respondent purchased, from points outside the State of Montana, goods valued in excess of $50,000 and sold plywood valued in excess of $50,000 to purchasers located at various out-of-State points. Upon the Complaint's jurisdictional allegations, which are conceded to be accurate, I find the Respondent is now, and at all times material has been, an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the Act, as amended. With due regard for the jurisdictional standards which the Board presently applies—see *Siemons Mailing Service*, 122 NLRB 81, 43 LRRM

1046, and related cases—I find assertion of the Board's jurisdiction in this case warranted and necessary to effectuate statutory objectives.

II. The Labor Organization Involved

Plywood, Lumber and Sawmill Workers Local Union No. 2405, AFL-CIO, variously designated as the Union or Charging Party herein, is a labor organization within the meaning of Section 2(5) of the Act, as amended, which admits Respondent's employees to membership.

III. The unfair Labor Practices

A. *Issue*

Within their briefs, both counsel suggest that the sole question presented by the present record is whether Respondent violated Section 8(a)(5) of the statute when, during the term of its contract with the Charging Party, it unilaterally inaugurated a system of compensation, for some plywood plant workers covered thereby, designated as a production bonus or premium pay plan. General Counsel argues that the record shows Respondent's resort to unilateral action with respect to such a production bonus or premium pay plan, during the term of a subsisting contract, despite the fact that management's right to promulgate and maintain such a system of compensation had not been fully discussed, consciously explored, conceded or clearly waived by Union negotiators. Respondent's counsel, however, contends, first, that representatives of the firm have bargained "fully and legally" with respect to all matters about which Respondent may legally be required to bargain, under the circumstances. Secondly, Respondent argues that its course of conduct derived from management's good faith belief that promulgation of the production bonus or premium pay plan, during their contract's term, was permissible under certain relevant contract language. Thirdly, Respondent contends that the Charging Party "effectively and clearly" waived its right to bargain regarding the challenged compensation plan. Lastly, Respondent's counsel suggests that the present dispute with respect to the propriety of Respond-

ent's decision derives from differences between the firm's management and Union representatives with respect to the proper interpretation of certain contract language; counsel contends that this agency has not previously assumed, and should not now assume, the role of a contract policeman, by attempting to decide whether disputes regarding the meaning and administration of contract terms constitute an unfair labor practice.

B. *Facts*

1. Preliminary matters

General Counsel alleges, and Respondent concedes, that the Charging Party herein—since on or about August 28, 1962, and at all times material thereafter—has been [fol. 138] the certified representative for collective bargaining purposes of Respondent's workers within a group defined as follows:

> All production and maintenance employees of the Employer at its veneer and plywood plants near Kalispell, Montana, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

Through its answer, Respondent has conceded the appropriateness of the workers' group thus defined, for the purposes of collective bargaining, within the meaning of Section 9(b) of the statute. Further, Respondent has conceded that, by virtue of Section 9(a) of the Act, the Union has been, and now is, entitled to function as the exclusive representative of all the firm's employees within the unit described, for the purposes of collective bargaining in regard to rates of pay, wages, hours of employment, and other conditions of work.

2. Contract negotiations

From October 1962, until May 1, 1963, representatives of Respondent and the Charging Party negotiated with respect to a contract. Their negotiations required eleven bargaining sessions, the last two of which were held on

March 12th and April 19th; thereafter, the negotiators signed their "Working Agreement" with a May 1st effective date.

The contract provided that it would remain in full force and effect through October 31, 1963, and from year to year thereafter, absent some appropriately timed written notice proffered by either party of a desire to change, modify, or terminate it. Further, the contract contained, among others, the following provisions:

Article XVII

WAGES

A. A classified wage scale has been agreed upon by the Employer and Union, and has been signed by the parties and thereby made a part of the written agreement. *The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to regard any particular employee for some special fitness, skill, aptitude or the like.* The payment of such a premium rate shall not be considered a permanent increase in the rate of that position and may, at sole option of the Employer, be reduced to the contractual rate at such time as the Employer feels that the employee no longer merits the premium, except that no present employee of the date of signing of this original Working Agreement shall suffer a wage reduction as a result of this Agreement. (Emphasis supplied).

* * * *

Article XIX

WAIVER OF DUTY TO BARGAIN

The parties acknowledge that during negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter of collective bargaining, and that the understanding and [fol. 139] agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and Union,

for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agree that the other shall not be obligated to bargain collectively with respect to any subject matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

The contract likewise included a classified wage scale, with hourly rates specified for twenty-seven job classifications. Wages were declared "closed" for the duration of the contract's term, subject to "opening" in the same manner as provided in the contractual termination provision.

During a negotiating session "quite some time prior" to the contract's execution, Respondent's principal negotiator, General Manager Thomason, mentioned that some other lumber products company had proposed an "incentive bonus system" within its plywood department. Robert Weller, executive secretary of the Montana District Council, Lumber and Sawmill Workers, and the Charging Party's principal negotiator, declared, however, that the Union would not agree to such a plan. None of the parties, then, pursued the matter.

Later—but some time before their March 12, 1963 session—the negotiators reached tentative agreement with respect to the general "wage" clause of their projected contract. The clause—so far as the record shows—was reduced to written form, ready for subsequent incorporation within the contract when the parties reached complete agreement with respect to that document's terms.

During their March 12th session, negotiators for Respondent and the Charging Party reached a temporary impasse regarding hourly wage rates for workers within the three job classifications which made up the firm's glue spreader crews.

(These job classifications included core feeders, core layers and sheet turners. Throughout the period which this case is concerned there were 118-201

workers employed within the unit previously found appropriate by the Board for the purposes of collective bargaining; approximately some 26-32 men staffed Respondent's glue spreader crews.)

Following separate caucus sessions—conducted with a Federal Concilator's participation—company and Union negotiators met jointly to conclude the session. Within a context which the record—taken as a whole—leaves somewhat vague, General Manager Thomason of Respondent informed the Union negotiators that the firm was considering a premium pay or incentive pay program for workers on glue spreader crews. So far as the record shows, Thomason's comment elicited no reply.

Within his brief, the Charging Party's business representative professes no recollection with respect to such a statement purportedly made by Respondent's general manager; the Union contends that such a statement, if made, must rave been made to the Federal Concilator during Respondent's separate caucus. During cross-examination, however, Business Representative Weller substantially conceded knowledge with respect to Thomason's comment. With respect to this aspect of the case, his testimony reads as follows:

[fol. 140] Q. Now, wasn't it true that these so-called premium incentive plans were discussed at some length in the meeting, particularly, that occurred on March 12, 1963?

A. I don't think so, in fact, the company didn't actually propose any incentive rates.

* * * *

Q. Didn't the company advise you and your associates representing the union that they were studying an incentive or premium program?

A. That they had and probably were studying it or considering it or something.

Q. And that they were anticipating putting one into effect?

A. They may have said they would like to or had in mind something like that but they didn't anticipate they were going to put anything into effect.

With matters in this posture, I find that Thomason did mention that Respondent was "giving thought" to the possibility of promulgating a premium pay or incentive pay program for glue spreader crews. While a witness, Respondent's general manager testified that the firm's consideration of some possible premium or incentive pay for these crews derived from management's behalf that such a plan would be permissible under Respondent's contractually-reserved right to pay "premium rate(s) over and above the contractual classified wage rate(s)" which had been set forth within their projected contract's tentative "wage" provision; Thomason, however, could not recall any specific reference to Respondent's presumption regarding the relationship between premium pay plans which the firm's management was then considering and the projected contract's general "wage" provision.

(Summoned as Respondent's witness, Dexter Bright, Montana representative for Timber Products Manufacturers Association—who had been present throughout the negotiations—testified that his notes regarding the March 12th session show, "Company is working on an incentive plan for spreader crews *under premium clause.*" [Emphasis supplied]. Such a notation, however, cannot be considered reliable, probative, or substantial evidence that Respondent's negotiators *mentioned* their reliance upon the projected contract's "premium clause," to justify the firm's consideration of some incentive pay plan for glue spreader crews. Since Bright had previously participated in discussions with management representatives, regarding the propriety of some incentive pay plan consistent with the projected contractual provision, his notation could be construed merely as a reflection of his personal conception regarding Respondent's presumptive justification.)

Final agreements were reached April 19th with respect to remaining differences between the negotiators; on May 1, 1963, the negotiated "Working Agreement" between Respondent and the Charging Party was signed.

Thereafter, on May 20th, Respondent posted a plant notice regarding a premium pay schedule for glue spread-

er crews which management proposed to try for a few months "to determine how it [would] work" for those concerned. The plan provided that core feeders, core layers, and sheet turners would receive pay at the rate of $2.50 per hour, contingent upon their particular crew's [fol. 141] achievement of certain stated production standards within the firm's regular two-week pay period; later, these standards were modified to reflect the norms which crews would have to meet within a weekly period.

(With respect to each of the three job classifications noted, the posted premium rate represented an hourly pay rate substantially higher than the classified hourly rate called for by the Working Agreement between Respondent and the Charging Party, previously negotiated. While the classified contractual wage rates for each of the three job classifications varied, the achievement of Respondent's stated production standard by a given glue spreader crew would entitle every member of the crew in question, regardless of job classifications, to receive the same $2.50 hourly premium rate.)

According to the posted plan, once Respondent's production standard was met—regardless of the degree by which production might exceed such a standard—the premium rate payable would remain the same. The plan made no provision for further premium rate increases commensurate with increased production under the plan. Respondent's proposal to pay $2.50 per hour, thus, represented a set premium rate declared payable to each glue spreader crew member whenever his particular crew, within a given pay period, reached or exceeded the previously set production goal.

The record shows that Respondent's premium pay plan was formulated, and management's bulletin with respect thereto posted, without prior notice to the Charging Party, and without affording Union representatives any opportunity to consult or bargain with company spokesmen regarding its propriety. The plan came to the charging Party's attention, however, when one of Respondent's workers brought copy of the firm's bulletin to the Union office.

By letter dated May 27th, Business Representative Weller of the Charging Party requested a conference with Company representatives to discuss the firm's premium pay notice. Respondent was advised that:

> We do not consider this to be premium pat within the meaning of Article XVII, but rather a change in wages made dependent upon a production basis rather than hourly rates agreed upon with the Union.

Weller professed the Union's willingness to discuss hourly rate increases or premium hourly rates, generally but declared that his organization did not consider the subject of production bonuses, or wage rates based upon production standards, properly open for negotiations.

Respondent replied promptly, suggesting a conference date. Thereafter, two meetings were held, the first on June 7th and the second on July 15th. During both sessions, Union representatives, though given a chance to seek a clarification or to negotiate regarding the terms of the firm's incentive bonus or premium pay plan, refused raise questions or to discuss them. They simply requested the plan's recission. Shortly after the first meeting noted, Respondent was notified, by letter, that:

> . . . we do not consider the unliateral changing of agreed upon hourly wage rates to a method of computing wages by a different method to be proper either under the contract or under statutes regulating collective bargaining relationships . . . .

Respondent's representatives, however, maintained their previously-declared position with respect to the propriety of the posted premium compenations plan under the contract's general "wage" provision. They refused to rescind the plan. With matters in this posture, the charge, herein, was filed.

[fol. 142] C. *Conclusions*

General Counsel contends that Respondent's May 20th bulletin promulgated a new compensation plan for glue spreader crew personnel, which the firm's newly negotiated contract did not sanction. The posted notice, so the

argument runs, reflected Respondent's promulgation of a *group* incentive or production bonus plan, which did not provide for the compensation of "particular" workers at some premium hourly rate calculated to reward such workers, particularly, for their special fitness, skill, aptitude, or the like—this, because Respondent's plan merely provided that each member of a deserving glue spreader crew would receive a uniform premium rate, regardless of job classification, whenever the given crew's production reached or exceeded stated production norms. Respondent, however, argues that Article XVII within its current contract permitted management's promulgation of the "premium pay" program now in question—this, because the uniform hourly rate which might be payable under the plan represented a premium rate payable whenever the firm's stated production norm would be reached or exceeded, and because the capacity of glue spreader crews to satisfy such a production standard would necessarily derive from their possession of "some special fitness, skill, aptitude" or the like.

Substantially, therefore, this case reflects a dispute with respect to the scope of Respondent's contractually-reserved right to pay a premium rate conditioned upon the firm's desire to reward particular workers possessed of certain qualifications. General Counsel's complaint charges no statutory violation severable from this dispute between Respondent and the Charging Party, derived entirely from their conflicting contract interpretations.

> (Respondent is charged, merely, with unilaterally promulgating a group wage incentive plan, without prior consultation and despite Union objections. Respondent contends, precisely, that management was free to take such concededly unilateral action without prior consultation, pursuant to its contractually-reserved right to pay premium rates for specifically designated purposes.)

Certainly, these disparate contentions—with respect to the type of wage rate revision which the contract permitted—reveal that the general "wage" provision in question cannot, really, be considered sufficiently clear, in this particu-

lar regard, to forestall disputes regarding its scope. Despite a contrary contention by General Counsel and the Charging Party's representative, no persuasive demonstration has been proffered that Respondent's management—when it promulgated the disputed premium pay plan for glue spreader crew members—was acting in bad faith.

(Considerable testimony was received relative to various functions performed by core feeders, core layers and sheet turners working as members of glue spreader crews; Respondent has suggested that workers within these job classifications must possess certain designated skills, aptitudes, and the like, together with the ability effectively to mesh such "skills, aptitudes and fitnesses" with those of other crew members. Upon the entire record, however, no conclusion need be reached with respect to the substantive merits of Respondent's view. The belief of the firm's management that each crew member's "skill, aptitude and fitness" could properly be compensated through payment at some uniform premium rate, pursuant to the contract's general "wage" provision certainly cannot be dismissed as lacking rational justification.)

[fol. 143] General Manager Thomason's decision—so far as the record shows—was consciously reached within the framework of his firm's contract, as he construed it, and did not reflect a deliberate attempt to modify or terminate it. See *United Telephone Company of the West*, 112 NLRB 779. The Board's decision in the cited case—with respect to circumstances substantially comparable—declared that:

Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years, with the approval of the courts; '. . . it will not effectuate the statutory policy . . . for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether

disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act." (Citing cases).

In this connection, further, see *Morton Salt Company*, 119 NLRB 1402, wherein the Board—albeit in a case which did not involve a refusal to bargain—reached a comparable conclusion. Without passing upon Respondent's other contentions, I find these considerations dispositive of this case.

Within his complaint, General Counsel has charged Respondent with a further refusal, upon Union demand, to bargain collectively regarding the newly promulgated group wage incentive plan. With matters in their present posture, however, this contention cannot be sustained. Though Respondent's management, clearly, refused to concede any lack of propriety or justification with respect to the firm's promulgation of the disputed premium pay plan, spokesmen for the Company made manifest, throughout, their readiness to negotiate regarding the specific terms and conditions under which premium pay would be awarded workers on glue spreader crews. Representatives of the Charging Party, however, made no effort to bargain regarding the plan's content. With matters in their present posture, therefore, Respondent cannot be found in default—upon this ground either—with respect to its statutory obligation to bargain.[1]

CONCLUSIONS OF LAW

In the light of the foregoing findings of fact, and upon the entire record in this case, I make the following conclusions of law:

1. C & C Plywood Corporation is an employer within the meaning of Section 2(2) of the Act, engaged in com-

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[1] On November 18, 1963, counsel for Respondent filed a Motion to Correct Transcript herein. The motion listed 138 corrections for the 112 page record. While most of the transcript errors cited seem to be without real significance, no protests with respect to the motion have been filed. The motion is herewith made part of the record; correction of the transcript with respect to each of the matters set forth within the motion is hereby ordered.

merce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the Act, as amended.

2. Plywood, Lumber and Sawmill Workers Local Union No. 2405, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act, as amended, which admits employees of C & C Plwood Corporation to membership.

[fol. 144] 3. Respondent did not, through management's promulgation of a premium pay plan for glue spreader crew workers prior to consultation with Union representatives, or through its refusal to rescind the plan upon Union demand, refuse to bargain with the Charging Party, within the meaning of Section 8(a)(5) of the Act, as amended; nor has Respondent, thereby, interfered with, restrained or coerced employees in their exercise of rights statutorily guaranted, within the meaning of Section 8 (a)(1) of the Act, as amended.

RECOMMENDATION

Upon these finding of fact and conclusions of law, and upon the entire record in the case, my recommendation is that the Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended, dismiss the present complaint in its entirety.

Dated: January 3, 1964

/s/ Maurice M. Miller
Trial Examiner

[fol. 145] BEFORE
THE NATIONAL LABOR RELATIONS BOARD

Case No. 19-CA-2686

C & C PLYWOOD CORPORATION

and

PLYWOOD, LUMBER AND SAWMILL WORKERS LOCAL UNION No. 2405, AFL-CIO

DECISION AND ORDER—Aug. 24, 1964

On January 3, 1964, Trial Examiner Maurice M. Miller issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in unfair labor practices and recommending that the complaint be dismissed in its entirety, as set forth in the Trial Examiner's Decision attached hereto. Thereafter, the General Counsel and the Charging Party each filed exceptions to the Decision and a supporting brief. Respondent filed a brief in support of the Decision.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in the case, and finds merit in the exceptions. Accordingly, the Board adopts only so much of the findings, conclusions, and recommendations of the Trial Examiner as are consistent with this Decision.

On May 1, 1963, Respondent and the Union entered into a collective-bargaining agreement effective to October 31, 1963. The agreement contained a wage clause in Article XVII which stated in part:

> The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude, or the like.

On May 20, 1963, Respondent posted a notice announcing that effective immediately and "for the next couple of

[fol. 146] months," members of the glue spreader crews would receive premium pay provided that they met certain production standards.[1]

Respondent formulated and placed in effect the premium pay schedule without prior notice to, or bargaining with, the Union. About a week later the Union learned of the plan from one of its members. By letter dated May 27, the Union asked Respondent for a conference to discuss the premium pay notice. In the letter, the Union said:

> We do not consider this to be premium pay within the meaning of Article XVII, but rather a change in wages made dependent upon a production basis rather than hourly rates agreed upon with the Union.

The parties met on June 7 and 15, 1963. The Union requested rescission of the plan. Respondent refused although it offered to discuss terms of the plan. The Union then filed the present unfair labor practice charges alleging that Respondent had unlawfully refused to bargain by unilaterally establishing the premium pay plan.

The Trial Examiner found that the dispute between the Union and Respondent involved only a disagreement as to the meaning of terms of a collective-bargaining contract and that the promulgation of the premium pay plan according to Respondent's understanding of those terms was not a violation of Section 8(a)(5). We disagree.

In filing its unfair labor practice charge, the Union was complaining not of a violation of its contract with Respondent, but of the invasion of its statutory right as collective-bargaining representative of employees in the unit to bargain about any change in the terms and conditions of employment for such employees.[2] *Prima facie*,

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[1] The contract rates of pay for members of the glue spreader crew were: core feeder $2.24; core layer, $2.29; sheet turner, $2.15. The premium pay schedule provided for an hourly rate of $2.50 to each member of the crew.

[2] *Timken Roller Bearing Co.* v. *N.L.R.B.*, 325 F. 2d 746 (C.A. 6); *Smith Cabinet Mfg. Co., Inc.*, 147 NLRB No. 168. This is not a case like *United Telephone Company of the West*, 112 NLRB 779, or *Morton Salt Company*, 119 NLRB 1402, relied upon by the Trial

Respondent's change in the terms for compensating glue spreader crews without notification to, or bargaining with, [fol. 147] the Union violated Section 8(a)(5).[3] The Board has recognized, that the statutory right of a union to bargain about changes in terms and conditions of employment may be waived by the union. Respondent's affirmative defense to the *prima facie* case is that there was such a waiver in this case. It contends: (a) during the contract negotiations, the Union waived its right to be consulted about group incentive pay; and (b) the wage clause in the contract gave the Respondent the right unilateraly to put into effect a wage incentive plan.

In order to determine the validity of this waiver defense, the Board must necessarily evaluate the testimony as to what occurred during contract negotiations, and must interpret the wage clause of the contract. We find no obstacle to either course. The Board is not unfamiliar with the problems of contract construction. For example, it is frequently required to construe contracts in representation cases when a contract is claimed to be a bar to a representation petition, and in unfair labor practice proceedings involving the meaning and validity of union-security clauses, or clauses alleged to be violative of Section 8(e). Moreover, this is not a case where the identical question of contract construction is pending before a civil court or an arbitrator and in the interests of comity, the Board defers to the other tribunal.[4] Accordingly, we reject the argument that, because determination of the validity of the defense involves construction of the collective-bargaining contract, the complaint alleging an 8(a)(5) violation should be dismissed.[5]

Examiner, where an alleged breach of contract was the very basis for the 8(a)(5) allegation in the first case, and for the 8(a)(1) and (2) allegations in the second.

[3] *N.L.R.B.* v. *Katz*, 369 U.S. 736.

[4] See *National Dairy Products Co.*, 126 NLRB 434; *United Telephone Company of the West*, *supra*. The contract between the Union and Respondent contains no provision for arbitration.

[5] *Smith Cabinet Manufacturing Company, Inc.*, *supra*.

(a) Waiver of a statutory right will not lightly be inferred. The relinquishment to be effective must be "clear and unmistakeable." [6] Or as the Board said in the *Proctor Manufacturing* case: [7]

> The Board's rule, applicable to negotiations during the contract term with respect to the subject which has been discussed in precontract negotiations but [fol. 148] which has not been specifically covered in the resulting contract, is that the employer violates Section 8(a)(5) if, during the contract term, he refuses to bargain or takes unilateral action with respect to the particular subject, unless it can be said from an evaluation of the prior negotiations that the matter was "fully discussed" or "consciously explored" and that the Union "consciously yielded" or clearly and unmistakably waived its interest in the matter.

In the present case, the Trial Examiner found that during contract negotiations, Respondent's negotiator mentioned that Respondent was "giving thought" to the possibility of promulgating a premium pay or incentive wage program for glue spreader crews. This alone, although in the context of a resulting contract which does not "specifically cover" a group incentive pay plan, is not a waiver by the Union under the above standard. In addition, we believe that any conclusion that the Union "consciously yielded" on the *group* suggestion made by the Respondent is negated by the inclusion in the contract of a specific provision for *individual* premium pay. Moreover, the Trial Examiner found that this comment was made at a bargaining session when the parties had reached an impasse over the hourly rates for the three job classifications which constituted the glue spreader crews.

Accordingly, we find that there is not sufficient evidence under the above standard to establish that the Union waived its right to bargain about a wage incentive system.

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[6] *Timken Roller Bearing Co.* v. *N.L.R.B.*, *supra*.

[7] *Proctor Manufacturing Co.*, 131 NLRB 1166, 1169.

(b) The wage clause gives Respondent the right to pay a premium rate to "reward any particular employee for some special fitness, skill, aptitude, or the like." It seems to us that this clause grants the Employer the right to make individual merit increases for special competence or skill. We do not construe it, as Respondent apparently does, to authorize Respondent to select a group of employees and unilaterally change the method of compensating them from a straight hourly basis, with a fixed rate for each job category, to what is in effect a production basis, by raising the hourly contract wage rate contingent upon increased productivity. To accept Respondent's construction is tantamount to saying that the Union inferentially surrendered to Respondent the right unilaterally to establish production standards and wage rates based thereon as a method for compensating employees. Such an intent is so contrary to labor relations experience that it should not be inferred unless the language of the contract or the history of negotiations clearly demonstrates this to be a fact. We see nothing in these negotiations or this contract to establish that the Union intended [fol. 149] to waive its statutory right to bargain over the matter in dispute. The Union's prompt protest against Respondent's posting of the new wage schedule also belies any such intent.

Accordingly, we find that by unilaterally changing the wage rates for members of the glue spreader crews Respondent violated Section 8(a)(5) and (1) of the Act.

The effect of the unfair labor practice upon commerce

The conduct of the Respondent set forth above, occurring in connection with the operations of Respondent as set forth in Section I of the Trial Examiner's Decision, has a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, we shall order that it cease and

desist therefrom, and from like or related conduct, and that it take certain affirmative action to effectuate the policies of the Act.

Conclusions of Law

1. C & C Plywood Corporation is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Plywood Lumber and Sawmill Workers Local Union No. 2405, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By instituting a premium pay plan for glue spreader crew workers without notice to, or bargaining with, the Union, Respondent violated Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

[fol. 150] (a) Failing or refusing to bargain collectively with Plywood, Lumber and Sawmill Workers Local Union No. 2405, AFL-CIO, as the exclusive representative of its employees in the appropriate bargaining unit,[8] by unilaterally instituting a premium pay plan for glue spreader crews or otherwise changing any term or condition of employment of employees within the aforesaid unit without prior notice to, and bargaining with, the Union.

[8] The appropriate unit is composed of all production and maintenance employees of the Respondent at its veneer and plywood plants near Kalispell, Montana, excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act.

(a) Upon request, bargain with Plywood, Lumber, and Sawmill Workers Local Union No. 2405, AFL-CIO, with respect to the institution of a premium pay plan for glue spreader crews and, if requested by said Union, rescind any plan which Respondent may have unilaterally instituted.

(b) Post in its plant in Kalispell, Montana, copies of the notice attached hereto marked "Appendix."* Copies of such notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by an authorized representative of Respondent, be posted immediately upon receipt thereof, and be maintained by it for a priod of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

[fol. 151] (c) Notify the Regional Director for the Nineteenth Region, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D. C. Aug 24 1964

FRANK W. McCULLOCH, Chairman

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

NATIONAL LABOR RELATIONS BOARD

* In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

MEMBER LEEDOM, DISSENTING:

Unlike my colleagues, I would affirm the Trial Examiner for the reasons indicated in his Decision. As the Trial Examiner there points out, the Board has long held that it will not effectuate the policies of the Act for it to police collective-bargaining agreements by attempting to resolve disputes over their meaning, whatever a proper construction of the disputed language in the contract may be, where it is evident that the Respondent acted reasonably and in good faith. In such cases, the aggrieved party's remedy is to seek judicial or other enforcement of the contract.

As the Trial Examiner found, this is precisely such a case. My colleagues do not purport to depart from the *United Telephone* case, 112 NLRB 779, relied on by the Trial Examiner here, where the Board applied this salutary rule. Contrary to my colleagues, the case at bar differs in no significant respect from *United Telephone*.[10] [fol. 152] There, as well as here, the employer, *prima facie*, violated the Act by unilaterally changing terms or conditions of employment; in both cases, the terms of the contract at least colorably justified the employer's good-faith making of the the change; and here, as well as there, the parties disagreed with respect to the meaning of the contract, and a determination as to whether the employer violated the Act turns upon a proper construction of the contract. In these circumstances, the Union's remedy is before another forum.

Accordingly, like the Trial Examiner, I would dismiss the complaint.

Dated, Washington, D. C.
Aug 24 1964

BOYD LEEDOM, Member
NATIONAL LABOR RELATIONS BOARD

[10] While it is true that the pendency of a civil suit calling for interpretation of the contract was an additional reason for dismissal of the complaint in *United Telephone*, the fact that, here, no such suit is pending and there is no provision in the contract for arbitration, does not alter the established rule that the Board is not the proper forum to remedy a breach of contract or to obtain specific performance of its terms.

[fol. 153]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT fail to refuse to bargain collectively with PLYWOOD, LUMBER AND SAWMILL WORKERS LOCAL UNION NO. 2405, AFL-CIO, by unilaterally instituting a premium pay plan for glue spreader crews or otherwise changing any term or condition of employment in the unit composed of:

> All production and maintenance employees at our veneer and plywood plants near Kalispell, Montana, excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

C & C PLYWOOD CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 327 Logan Building, 500 Union Street, Seattle Washington, 98101 (Tel. No. MUtual 2-3300), if they have any question concerning this notice or compliance with its provisions.

[fol. 154]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: BARNES and KOELSCH, Circuit Judges, and MATHES, Senior District Judge

ORDER OF SUBMISSION—July 9, 1965

This cause coming on for hearing, Melvin Pollack, Attorney, N.L.R.B., argued for the appellant, and George J. Tichy, argued for the appellee, thereupon the Court ordered the cause submitted for consideration and decision.

[fol. 155]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: BARNES and KOELSCH, Circuit Judges, and MATHES, Senior District Judge

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE—Sept. 10, 1965

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that the decree be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

[fol. 156]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19,769

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

C & C PLYWOOD CORPORATION, RESPONDENT

OPINION—September 10, 1965

On Petition to Enforce an Order of the National Labor Relations Board

Before: BARNES and KOELSCH, Circuit Judges, and MATHES, Senior District Judge

MATHES, Senior District Judge:

The National Labor Relations Board petitions to enforce its order of August 24, 1964, which directs among other things that respondent: "Upon request, bargain with Plywood, Lumber, and Sawmill Workers Union No. 2405, AFL-CIO, with respect to the institution of a premium pay plan for glue spreader crews and, if requested by said Union, rescind any plan which Respondent may have unilaterally instituted."

The order sought to be enforced is the culmination of Administrative proceedings which followed filing by the union of a complaint before the Board on July 31, 1963, charging that respondent, as employer, "has engaged in and is engaging in unfair labor practices" within the meaning of section 8(a), subsections (1) and (5) of the National Labor Relations Act [29 U.S.C. § 158 (a) (1) and (5)], in that: "On or about May 20, 1963, the Employer unilaterally, and without agreement with representatives of its employees, changed the wages, rates of [fol. 157] pay and conditions of certain of its employees at a time when such rates of pay, wages and conditions had just been incorporated in a signed contract with the

Union and were not subject to renegotiation or change by either party."

Respondent conceded that at all times material to the proceeding, it was engaged in the business of processing and manufacturing plywood from green veneer at Kalispell, Montana; that since on or about August 28, 1962, the union had been the certified representative for purposes of collective bargaining of the employees involved and, as such, by virtue of § 9(a) of the Act [29 U.S.C. § 159(a)], had been and is now the exclusive bargaining representative of all employees in that unit; that from September, 1962, until May 1, 1963, the union and respondent engaged in a number of bargaining sessions culminating in a signed collective-bargaining agreement, effective from May 1, 1963, until October 31, 1963, but remaining in full force and effect from year to year thereafter absent notice of a desire to change; that since on or about May 20, 1963, without consulting the union, the respondent unilaterally, and over the objection of the union, instituted a group wage incentive plan affecting approximately one-fourth of the employees in the appropriate bargaining unit.

Respondent denied the unfair-labor-practice charge, and asked the Board to dismiss the complaint. Respondent's consistent position has been that the group wage incentive plan was instituted in the good-faith belief that the plan was permissible under the provisions of the collective-bargaining agreement and that, even if not expressly permitted, the only issue presented to the Board was a disagreement as to the proper interpretation of the contract. Thus respondent has contended throughout that the matter was not properly before the Board on an unfair-labor-practice charge.

The two articles of the collective-bargaining agreement relied upon by respondent are the following:

"Article XVII

"WAGES

"A. A classified wage scale has been agreed upon by the Employer and Union, and has been signed by the

[fol. 158] parties and thereby made a part of the written agreement. The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like. The payment of such a premium rate shall not be considered a permanent increase in the rate of that position and may, at sole option of the Employer, be reduced to the contractual rate at such time as the Employer feels that the employee no longer merits the premium, except that no present employee of the date of signing of this original Working Agreement shall suffer a wage reduction as a result of this Agreement.

* * * *

"Article XIX

"WAIVER OF DUTY TO BARGAIN

"The parties acknowledge that during negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter of collective bargaining, and that the understanding and agreement arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Union, for the life of this Agrement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement."

The Trial Examiner found that respondent acted in the good-faith belief that it was authorized by the above-quoted provisions of the collective-bargining agreement to take the unilateral action it did with respect to the premium pay in question. The Examiner then concluded:

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"General Manager Thomason's decision—so far as the record shows—was consciously reached within the [fol. 159] framework of his firm's contract, as he construed it, and did not reflect a deliberate attempt to modify or terminate it. See *United Telephone Company of the West*, 111 NLRB 779. The Board's decision in the cited case—with respect to circumstances substantially comparable—declared that:

> "Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years, with the approval of the courts; '. . . it will not effectuate the statutory policy . . . for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act.'"

The Trial Examiner thereupon recommended to the Board:

> "Upon these findings of fact and conclusions of law, and upon the entire record in the case, my recommendation is that the Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended, dismiss the present complaint in its entirety."

The Board, with one member dissenting, reversed the Trial Examiner, observing in part:

> "The Trial Examiner found that the dispute between the Union and Respondent involved only a disagreement as to the meaning of terms of a collective-bargaining contract and that the promulgation of the premium pay plan according to Respondent's understanding of those terms was not a violation of Section 8(a)(5). We disagree.
>
> "In filing its unfair labor practice charge, the Union was complaining not of a violation of its contract with Respondent, but of the invasion of its

statutory right as collective-bargaining representative of employees in the unit to bargain about any change in the terms and conditions of employment for such employees."

[fol. 160] Because the union elected to file an unfair labor practice complaint with the Board, rather than to proceed in the courts, the question presented involves the power of the Board under § 10(a):

> "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." [29 U.S.C. § 160(a).]

The proceeding before us is, therefore, to be distinguished from cases involving suits originally instituted in the courts under § 301(a) of the National Labor Relations Act. [29 U.S.C. § 185(a); *cf.*: *Humphrey* v. *Moore*, 375 U. S. 335 (1964); *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962); *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962); *Retail Clerks Int. Assoc.* v. *Lion Dry Goods, Inc.*, 369 U. S. 17 (1962); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962); *Dowd Box Co., Inc.* v. *Courtney*, 368 U. S. 502 (1962); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236 (1959).]

We recently held in *Square D Company* v. *N.L.R.B.*, 332 F. 2d 360 (9th Cir. 1964), that the Board has no jurisdiction to adjudge an unfair labor practice where "the existence of an unfair labor practice . . . is *dependent* upon the resolution of a preliminary dispute involving *only* the interpretation of the contract". [Emphasis in the original, 332 F. 2d at 365-366.]

Although the Board contends that *Square D.* does not control our decision here, admittedly the majority of the Board found it necessary to "construe" the collective-bargaining agreement in order to find an unfair labor practice. Indeed, the Board majority "construed" the contract by looking back to negotiations presumably merged in the agreement, as well as to the provisions of the agreement itself, and by considering also the fact that the union

made "prompt protest" against respondent's action, admittedly taken under what respondent conceived to be a proper interpretation of the agreement.

We note, moreover, that the rationale of the Board majority, in construing the contract as it did, was as unique [fol. 161] as it was circuitous. The course of reasoning was that the provisions of the collective-bargaining agreement are "so contrary to labor relations experience" that the union should never have executed such a contract; and since the provisions in question should never have been agreed to by the union, it must be presumed that the union did not intend them, since the union's "prompt protest against Respondent's posting of the new wage schedule . . . belies any such intent".

The Board would distinguish the controversy here from that in *Square D.*, by quoting the language of our opinion recognizing the jurisdiction of the Board in instances of "a controversy over the applicability or violation of a duty not only prescribed by the contract but also imposed directly by the Act, disregard of which would constitute an unfair labor practice". [*Square D. Company* v. *N.L.R.B.*, *supra*, 332 F. 2d at 364.] But we find no support for the Board's position in that language.

Where the disputed provisions of a collective-bargaining agreement do no more than affirmatively prohibit conduct already defined and forbidden by the Act as an unfair labor practice, the Board can never be ousted of jurisdiction, for the reason that the controversy would involve no more than a breach of these negative contract provisions—a violation of duty already "imposed directly by the Act", irrespective of the contract itself. Were it otherwise, it would be a simple matter to remove from the jurisdiction of the Board all unfair labor practice disputes, by the facile device of prohibiting in the collective-bargaining contract all unfair labor practices defined in the Act.

The disputed provisions of the collective-bargaining agreement at bar clearly present quite a different situation from that just discussed. Here, the parties have arguably agreed affirmatively to permit conduct which, sans contract, the Act would admittedly condemn as an unfair labor practice. The resulting controversy then, as to wheth-

er the provisions of the contract positively sanction the action complained of, is a matter for arbitration where, as in *Square D.*, the collective-bargaining agreement so provides, or for adjudication by the Courts; and hence is beyond the subject-matter jurisdiction of the Board. This is necessarily so because, under the circumstances at [fol. 162] bar, the very existence of the alleged unfair labor practice is "*dependent* upon the resolution of a preliminary dispute involving *only* the interpretation of the contract". [*Square D. Company* v. *N.L.R.B.*, *supra*, 332 F. 2d at 365-366.]

Since the Board has no jurisdiction to enforce collective bargaining agreements as such, both reason and policy dictate that adjudication of disputes, as to the scope of contractual rights and obligations, be by tribunals empowered to compel compliance with them. As declared in *N.L.R.B.* v. *American National Ins. Co.*, 343 U. S. 395 (1952), "the Board may not, either directly or indirectly, . . . sit in judgment upon the substantive terms of collective bargaining agreements". [343 U. S. at 404; see also: *Dowd Box Co., Inc.* v. *Courtney*, *supra*, 368 U. S. at 510-513; *Square D. Company* v. *N.L.R.B.*, *supra*, 332 F. 2d at 366; *In Re Morton Salt Co.*, 119 N.L.R.B. 1402, 1403 (1958); *In Re United Tel. Co. of the West*, 112 N.L.R.B. 779, 781-782 (1955).]

Here, as in *N.L.R.B.* v. *Nash-Finch Co.*, 211 F. 2d 622 (8th Cir. 1954):

> "It seems to us that what the Board has done, under the guise of remedying unfair labor practices, is to attempt to bestow . . . benefits which it believes the Union should have obtained but failed to obtain . . . as a result of its collective bargaining with the respondent . . . ." [211 F. 2d at 627.]

Undeniably, the specific controversy at bar is whether the respondent or the union has correctly interpreted the quoted provisions of Section A of Article XVII of the collective-bargaining agreement. Moreover, since the nature of the controversy is such that the existence or non-existence of an unfair labor practice does not turn entirely upon the provisions of the Act but arguably upon a good-faith dispute as to the correct meaning of the provisions

of the collective-bargaining agreement, the Courts have jurisdiction. [*Square D. Company* v. *N.L.R.B.*, *supra*, 332 F. 2d 360.] Although this may in some cases unavoidably delay exercise of the Board's unquestioned jurisdiction under § 10(a) of the Act to control unfair labor practices affecting commerce [29 U.S.C. § 160(a)], such a rule will not operate to encroach upon that jurisdiction. [fol. 163] For the reasons stated, the Board's petition to enforce the challenged order is denied, and the matter is remanded to the Board with directions to vacate the order and to dismiss the complaint, and all unfair-labor-practice proceedings herein, for lack of the Board's present jurisdiction over the subject matter.

[fol. 164]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19,769

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

C & C PLYWOOD CORPORATION, RESPONDENT

DECREE—September 10, 1965

Before: BARNES and KOELSCH, Circuit Judges, and MATHES, District Judge

This cause came on to be heard upon the petition of the National Labor Relations Board, filed December 21, 1964, to enforce an order of said National Labor Relations Board issued by it on August 24, 1964, against the respondent, its officers, agents, successors and assigns, and of the answer, filed January 8, 1965, to said petition.

The court heard argument of respective counsel on July 9, 1965, and has considered the transcript of record and briefs filed in this cause.

On September 10, 1965, the court being full advised in the premises, handed down its decision, and in conformity thereto.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that the petition of the National Labor Relations Board be, and hereby is denied, and that this case be, and hereby is remanded to the said Board with directions to vacate the order and to dismiss the complaint, and all unfair-practice proceedings herein for lack of the Board's present jurisdiction over the subject matter.

[File Endorsement Omitted]

[fol. 165]

[Clerk's Certificate Omitted in Printing]

[fol. 166]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1965

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

C & C PLYWOOD CORPORATION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—December 10, 1965

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 8, 1966.

/s/ W. O. Douglas
Associate Justice of the Supreme
Court of the United States

Dated this 10th day of December, 1965.

[fol. 167]

SUPREME COURT OF THE UNITED STATES

No. 884, October Term, 1965

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

C & C PLYWOOD CORPORATION

ORDER ALLOWING CERTIORARI—April 18, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 876.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 O - 223897 10

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CITATIONS

Cases:

Carey v. *Westinghouse Electric Corp.*, 375 U.S. 261	9, 10
Century Papers, Inc., 155 NLRB No. 40	8
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Square D Company v. *National Labor Relations Board*, 332 F. 2d 360 6
Steelworkers v. *American Manufacturing Co.*, 363 U.S. 564 7
Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 7
Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 ..... 7, 12
United Telephone Company of the West, 112 NLRB 779 7

Statute involved:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*)

Section 8(a)(1) 37
Section 8(a)(5) 5, 8, 10, 11, 37
Section 10(a) 9, 37

Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. 151, *et seq.*)

Section 203(d) 7, 12, 37
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In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

C & C PLYWOOD CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on September 10, 1965.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 14-23) is not yet officially reported. The Board's decision and order (Appendix B, *infra*, pp. 25-36) are reported at 148 N.L.R.B. 414.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1965 (Appendix A, *infra*, p. 24). On December 10, 1965, Mr. Justice Douglas extended the time for filing a petition for certiorari to and including January 8, 1966. This Court has jurisdiction under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act (29 U.S.C. 160 (e)).

QUESTION PRESENTED

Whether, where an employer changes the wage rates of his employees without bargaining with their union representative, contending that such unilateral action is permitted by the collective bargaining agreement between the parties, the National Labor Relations Board is without power to decide whether an unfair labor practice has been committed until the contract issue has first been decided by the courts.

STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix C, *infra*, pp. 37-38.

STATEMENT

Effective May 1, 1963, Plywood, Lumber and Saw Mill Workers, Local Union No. 2405, AFL-CIO, the certified representative of respondent's production and maintenance employees, entered into a collective bargaining agreement with the company. Article

XVII of the contract, captioned "Wages", provides in part (R. 19):[1]

> A. A classified wage scale has been agreed upon by the Employer and the Union, and has been signed by the parties and thereby made a part of the written agreement. The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like. * * *

Article XIX of the contract, captioned "Waiver of Duty to Bargain", provides (R. 19-20):

> The parties acknowledge that during negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and Union, for the life of this Agreement, each voluntarily * * * waives the right and each agree that the other shall not be obligated to bargain collectively with respect to any subject matter not specifically referred to or covered in this Agreement * * *.

The contract contains no arbitration provision (Appendix B, *infra*, p. 28, n. 4).

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[1] "R" references are to Volume I of the record in the court below; "Tr." references are to the transcript of testimony in Volume II of that record; references designated "G.C.X." or "R.X." are to the exhibits of the General Counsel and respondent, respectively. A copy of this material has been filed with this petition.

The company employed approximately 26 to 32 men as members of several glue spreader crews.[1] The hourly rates of pay listed in the contract for members of the glue spreader crews were: sheet turner, $2.15; core feeder, $2.24; core layer, $2.29. (Appendix B, *infra*, p. 26, n. 1; G.C.X. 2, following p. 14.) All wage rates listed in the contract were declared closed "for the term of the * * * Agreement, subject to opening in the same manner as provided" in the contract termination provision (R. 20; G.C.X. 2, p. 12).

On May 20, 1963, the company posted a notice that, effective immediately and "for the next couple of months," members of the glue spreader crews would receive premium pay at the rate of $2.50 per hour provided that they met certain production standards (Appendix B, *infra*, p. 26 and n. 1; R. 21-22; Tr. 73-76; G.C.X. 3). The company formulated and placed in effect the premium pay schedule without prior notice to, or bargaining with, the union; the union learned about the plan from one of its members about a week after the plan was instituted (Appendix B, *infra*, p. 26; R. 22; Tr. 11, 70; G.C.X. 3).

By letter dated May 27, 1963, the union asked the Company for a conference to discuss the premium pay notice, stating (Appendix B, *infra*, p. 26):

> We do not consider this to be premium pay within the meaning of Article XVII, but rather a change in wages made dependent upon a production basis rather than hourly rates agreed upon by the Union. As a matter of fact while we are

[1] The total number of employees represented by the union was between 181 and 201 (R. 12, 20).

> perfectly willing to discuss increasing the hourly rates, or to the [company] putting into effect premium hourly rates, we do not consider the subject of production bonuses, or wage rates based upon production standards, to be properly open for negotiation at this time.

The parties met on June 7 and 15. The union requested rescission of the premium pay plan. The company refused, while offering to discuss the terms of the plan (Appendix B, *infra*, p. 26). The union thereupon filed unfair labor practice charges with the Board, alleging that the company had violated its bargaining obligation by unilaterally instituting the premium pay plan, and a complaint was issued (R. 3, 4-6).

Following the usual proceedings, the Board rendered a decision in which it rejected the company's contention that the Board lacked power to adjudicate the unfair labor practice question because a threshold question of contract interpretation was presented; found that the wage clause of the contract had not been intended to give the company the right unilaterally to put into effect a wage incentive plan for the glue spreader crews; and concluded that the company had violated Section 8(a)(5) of the National Labor Relations Act by taking such unilateral action. The Board ordered the company to cease and desist from the unfair labor practice found, to bargain with the union upon request with respect to the institution of a premium plan for the glue spreader crews, and, if requested by the union, to rescind any plan unilaterally instituted. (Appendix B, *infra*, pp. 27-33.)

The court of appeals declined to enforce the Board's order. It held that, "since the nature of the controversy is such that the existence or non-existence of an unfair labor practice does not turn entirely upon the provisions of the Act, but arguably upon a good-faith dispute as to the correct meaning of the provisions of the collective-bargaining agreement," the controversy was "beyond the subject-matter jurisdiction of the Board"; it was "a matter for arbitration where * * * the collective-bargaining agreement so provides, or for adjudication by the Courts," where, as here, there was no arbitration provision (Appendix A, *infra*, pp. 22, 21).

REASONS FOR GRANTING THE WRIT

The court of appeals in this case, following its own earlier decision (*Square D Co.* v. *National Labor Relations Board*, 332 F. 2d 360 (C.A. 9)), held that the Labor Board does not have power to adjudicate an unfair labor practice complaint where the determination whether the conduct complained of is in fact an unfair labor practice depends on how the collective bargaining contract between the parties is interpreted. The court's view was that in such a case the Board must stay its hand pending resolution of the contract question either by the arbitrator, if the contract provides for arbitration, or if (as here) it does not, by a court in a suit for breach of contract under Section 301 of the Labor-Management Relations Act. The Fifth Circuit has reached the same conclusion. *Sinclair Refining Co.* v. *National Labor Relations Board*, 306 F. 2d 569. The question decided in

these cases is a difficult, important, and recurring one in the administration of the federal labor laws. The answer given by the court below appears to be in conflict with applicable decisions of this Court and erroneous. In the circumstances, review by this Court is warranted.

1. It has been the consistent view of the Labor Board that its power to remedy unfair labor practices is not limited by the fact that conduct constituting an unfair labor practice may also violate the collective bargaining contract, thereby giving rise to remedies in addition to the Board's. See, *e.g.*, *International Harvester Co.*, 138 N.L.R.B. 923, 925. To be sure, the Board in such a case will not automatically exercise jurisdiction. As a matter of discretion it may decline to proceed, remitting the parties to their contract remedies. The Board would, for example, ordinarily consider this the appropriate course where an arbitration proceeding had already been instituted. See *United Telephone Company of the West*, 112 N.L.R.B. 779; *Morton Salt Co.*, 119 N.L.R.B. 1402; *National Dairy Products Corp.*, 126 N.L.R.B. 434. Such abstention comports with the established policy which favors the resolution of labor disputes through the grievance and arbitration procedure established in the collective bargaining contract. See Section 203(d) of the Labor-Management Relations Act; *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593.

But the Board does not mechanically decline jurisdiction in all cases where there may be overlapping

Board and contract remedies. If there is no question of contract interpretation that must be resolved before the determination of an unfair labor practice can be made, if the contract contains no arbitration procedure, or if the contract defense is insubstantial or incompatible with the policies of the National Labor Relations Act, the Board may proceed to an adjudication of the unfair labor practice complaint. See *Cloverleaf Division of Adams Dairy Co.*, 147 N.L.R.B. 1410; *Smith Cabinet Mfg. Co.*, 147 N.L.R.B. 1506; *Century Papers, Inc.*, 155 N.L.R.B. No. 40.

Thus, under the Board's view, the question whether to proceed in a case where there are duplicate remedies—Board and contract—for the complained of conduct is one of discretion, not power. That discretion was exercised reasonably here. To be sure, whether the company's refusal to bargain over the wage increases it gave the glue spreaders was unfair under Section 8(a)(5) of the National Labor Relations Act depended on whether the union—as it was free to do—had in Article XVII of the contract waived its statutory right to bargain over such increases; and this was a question of contract interpretation. But the Board noted that the parties had established no arbitration procedure for the speedy resolution of such questions, and that the question was in any event free from substantial difficulty or doubt. In the circumstances, the Board concluded that the basic goals of federal labor policy—industrial peace and stability through free collective bargaining—would be better served by the issuance of an unfair labor practice order than by remitting the parties to the delays and

uncertainties of full-blown court litigation under Section 301. We submit that this judgment was sound and within the Board's power.

2. The Board's view of its authority in cases of this sort finds support in the provision of Section 10 (a) of the National Labor Relations Act that the Board's authority to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise," and in decisions of this Court. In *Smith* v. *Evening News Assn.*, 371 U.S. 195, 197, the Court expressly stated that "[t]he authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301 * * *." Similar expressions may be found in *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 101, n. 9, and *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 268, 271-272. To be sure, these judicial expressions were made in a context slightly different from that at bar. The question presented in each of these cases (except *Lucas*, which involved the distinct question whether Section 301 precludes State court actions to enforce collective bargaining contracts) was whether a suit under Section 301 was barred because the underlying conduct was also an unfair labor practice, rather than, as here, whether the presence of a question of contract interpretation litigable under Section 301 precludes the Board from acting upon an unfair labor practice complaint.

Furthermore, in those cases no question of contract interpretation would have had to be resolved by the

Board for it to determine whether an unfair labor practice had been committed. The provisions of the collective bargaining contracts on which the suits were based in each case merely repeated prohibitions contained in the National Labor Relations Act. The effect of the contract prohibitions was thus merely to give two remedies for the same misconduct—a Board remedy and a contract remedy—rather than to alter the parties' statutory rights and obligations. Here, it would have been impossible for the Board to adjudicate the unfair labor practice complaint without interpreting the contract. The employer violated Section 8(a)(5) of the Act only if the union did not waive its statutory bargaining right, which depends upon how Article XVII of the contract is interpreted. Hence, in exercising jurisdiction, the Board was compelled to interpret the contract—as would not have been necessary in *Smith* or *Carey*.

3. Admitting this possible distinction, we nonetheless believe that the decision below represents an unwise and unwarranted contraction of the Labor Board's authority. There are many cases—the present case, in our judgment, is one—in which an unfair labor practice proceeding may provide a more efficacious solution to a labor dispute than any other available remedy. Here, for example, since no arbitration procedure was established by the collective bargaining contract, the only alternative to the Board proceeding would have been a court proceeding under Section 301. Further, while a contract question was unavoidably presented by the unfair labor practice charge, it was, in the Board's view, a relatively simple

one. No reason appears why the Board should be absolutely foreclosed from proceeding in a case, like this, where it appears that the Board's proceeding is best designed to resolve the parties' differences with maximum dispatch. On the contrary, recognizing dual Board-court jurisdiction in such a case would impart a desirable flexibility to the legal machinery for solving labor disputes.

We find no bar to this result in the principle that the Board is without power to enforce collective bargaining contracts (*Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 510) and, correlatively, that the Board in general does not adjudicate contract disputes (*National Labor Relations Board* v. *Hyde*, 339 F.2d 568, 572 (C.A. 9)). The Board's proceeding here was not one to enforce a provision of the collective bargaining contract, but to enforce Section 8(a)(5) of the National Labor Relations Act; the contract was relevant only as a possible defense to the unfair labor practice charge. To be sure, the Board was required to interpret the contract in the course of the unfair labor practice proceeding, but its contract determination was wholly incidental to its unfair labor practice determination. Surely the Board is not incapable of resolving incidental questions of contract interpretation arising in the course of its proceedings. If that were the rule, the Board would be ousted of its jurisdiction in every case where it was possible for the respondent to interpose a contract provision as an arguable defense—even where, as the Board found here, the defense was clearly without merit. Such a result would diminish the Board's authority under the National

Labor Relations Act far more than Congress can reasonably be thought to have intended by the enactment of Section 301.

Additionally, and most pointedly, nowhere in the language or legislative history of either the National Labor Relations Act or the Labor-Management Relations Act is there any indication that Congress meant to limit in the slightest the Board's remedial authority under the former Act. So drastic a result certainly cannot be supported by reference either to Section 203(d) of the Labor-Management Relations Act, which provides that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement," or to this Court's expressions favoring the settlement of labor disputes through arbitration (*e.g.*, *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574). The parties in this case established no arbitration procedure; and, as noted earlier, the Board has made clear that it will ordinarily stay its hand where such procedure is available and is invoked. Consequently, the Board's position imports no interference with the resolution of labor disputes through private grievance and arbitration machinery created by collective bargaining contracts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

National Labor Relations Board.

JANUARY 1966.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19,769

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

C & C PLYWOOD CORPORATION, RESPONDENT

[September 10, 1965]

On Petition to Enforce an Order of the National Labor Relations Board

Before: BARNES and KOELSCH, Circuit Judges, and MATHES, Senior District Judge

MATHES, Senior District Judge:

The National Labor Relations Board petitions to enforce its order of August 24, 1964, which directs among other things that respondent: "Upon request, bargain with Plywood, Lumber, and Sawmill Workers Union No. 2405, AFL-CIO, with respect to the institution of a premium pay plan for glue spreader crews and, if requested by said Union, rescind any plan which Respondent may have unilaterally instituted."

The order sought to be enforced is the culmination of Administrative proceedings which followed filing

by the union of a complaint before the Board on July 31, 1963, charging that respondent, as employer, "has engaged in and is engaging in unfair labor practices" within the meaning of section 8(a), subsections (1) and (5) of the National Labor Relations Act [29 U.S.C. § 158 (a) (1) and (5)], in that: "On or about May 20, 1963, the Employer unilaterally, and without agreement with representatives of its employees, changed the wages, rates of pay and conditions of certain of its employees at a time when such rates of pay, wages and conditions had just been incorporated in a signed contract with the Union and were not subject to renegotiation or change by either party."

Respondent conceded that at all times material to the proceeding, it was engaged in the business of processing and manufacturing plywood from green veneer at Kalispell, Montana; that since on or about August 28, 1962, the union had been the certified representative for purposes of collective bargaining of the employees involved and, as such, by virtue of § 9(a) of the Act [29 U.S.C. § 159(a)], had been and is now the exclusive bargaining representative of all employees in that unit; that from September, 1962, until May 1, 1963, the union and respondent engaged in a number of bargaining sessions culminating in a signed collective-bargaining agreement, effective from May 1, 1963, until October 31, 1963, but remaining in full force and effect from year to year thereafter, absent notice of a desire to change; that since on or about May 20, 1963, without consulting the union, the respondent unilaterally, and over the objection of the union, instituted a group wage incentive plan affecting approximately one-fourth of the employees in the appropriate bargaining unit.

Respondent denied the unfair-labor-practice charge, and asked the Board to dismiss the complaint. Re-

spondent's consistent position has been that the group wage incentive plan was instituted in the good-faith belief that the plan was permissible under the provisions of the collective-bargaining agreement and that, even if not expressly permitted, the only issue presented to the Board was a disagreement as to the proper interpretation of the contract. Thus respondent has contended throughout that the matter was not properly before the Board on an unfair-labor-practice charge.

The two articles of the collective-bargaining agreement relied upon by respondent are the following:

"Article XVII

"WAGES

"A. A classified wage scale has been agreed upon by the Employer and Union, and has been signed by the parties and thereby made a part of the written agreement. The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like. The payment of such a premium rate shall not be considered a permanent increase in the rate of that position and may, at sole option of the Employer, be reduced to the contractual rate at such time as the Employer feels that the employee no longer merits the premium, except that no present employee of the date of signing of this original Working Agreement shall suffer a wage reduction as a result of this Agreement.

* * * *

"Article XIX

"WAIVER OF DUTY TO BARGAIN

"The parties acknowledge that during negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter of collective bargaining, and that the understanding and agreement arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement."

The Trial Examiner found that respondent acted in the good-faith belief that it was authorized by the above-quoted provisions of the collective-bargaining agreement to take the unilateral action it did with respect to the premium pay in question. The Examiner then concluded:

"General Manager Thomason's decision—so far as the record shows—was consciously reached within the framework of his firm's contract, as he construed it, and did not reflect a deliberate attempt to modify or terminate it. See *United Telephone Company of the West*, 111 NLRB 779. The Board's decision in the cited case—with re-

spect to circumstances substantially comparable —declared that:

> "Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years, with the approval of the courts; '. . . it will not effectuate the statutory policy . . . for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act.' "

The Trial Examiner thereupon recommended to the Board:

> "Upon these findings of fact and conclusions of law, and upon the entire record in the case, my recommendation is that the Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended, dismiss the present complaint in its entirety."

The Board, with one member dissenting, reversed the Trial Examiner, observing in part:

> "The Trial Examiner found that the dispute between the Union and Respondent involved only a disagreement as to the meaning of terms of a collective-bargaining contract and that the promulgation of the premium pay plan according to Respondent's understanding of those terms was not a violation of Section 8(a)(5). We disagree.
>
> "In filing its unfair labor practice charge, the Union was complaining not of a violation of its

contract with Respondent, but of the invasion of its statutory right as collective-bargaining representative of employees in the unit to bargain about any change in the terms and conditions of employment for such employees."

Because the union elected to file an unfair labor practice complaint with the Board, rather than to proceed in the courts, the question presented involves the power of the Board under § 10(a):

> "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." [29 U.S.C. § 160(a).]

The proceeding before us is, therefore, to be distinguished from cases involving suits originally instituted in the courts under § 301(a) of the National Labor Relations Act. [29 U.S.C. § 185(a); *cf.*: *Humphrey* v. *Moore*, 375 U. S. 335 (1964); *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962); *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962); *Retail Clerks Int. Assoc.* v. *Lion Dry Goods, Inc.*, 369 U. S. 17 (1962); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962); *Dowd Box Co., Inc.* v. *Courtney*, 368 U. S. 502 (1962); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236 (1959).]

We recently held in *Square D. Company* v. *N.L.R.B.*, 332 F. 2d 360 (9th Cir. 1964), that the Board has no jurisdiction to adjudge an unfair labor practice where "the existence of an unfair labor practice . . . is *dependent* upon the resolution of a preliminary dispute involving *only* the interpretation of the con-

tract". [Emphasis in the original, 332 F. 2d at 365-366.]

Although the Board contends that *Square D.* does not control our decision here, admittedly the majority of the Board found it necessary to "construe" the collective-bargaining agreement in order to find an unfair labor practice. Indeed, the Board majority "construed" the contract by looking back to negotiations presumably merged in the agreement, as well as to the provisions of the agreement itself, and by considering also the fact that the union made "prompt protest" against respondent's action, admittedly taken under what respondent conceived to be a proper interpretation of the agreement.

We note, moreover, that the rationale of the Board majority, in construing the contract as it did, was as unique as it was circuitous. The course of reasoning was that the provisions of the collective-bargaining agreement are "so contrary to labor relations experience" that the union should never have executed such a contract; and since the provisions in question should never have been agreed to by the union, it must be presumed that the union did not intend them, since the union's "prompt protest against Respondent's posting of the new wage schedule . . . belies any such intent".

The Board would distinguish the controversy here from that in *Square D.*, by quoting the language of our opinion recognizing the jurisdiction of the Board in instances of "a controversy over the applicability or violation of a duty not only prescribed by the contract but also imposed directly by the Act, disregard of which would constitute an unfair labor practice". [*Square D. Company* v. *N.L.R.B.*, *supra*, 332 F. 2d at 364.] But we find no support for the Board's position in that language.

Where the disputed provisions of a collective-bargaining agreement do no more than affirmatively prohibit conduct already defined and forbidden by the Act as an unfair labor practice, the Board can never be ousted of jurisdiction, for the reason that the controversy would involve no more than a breach of these negative contract provisions—a violation of duty already "imposed directly by the Act", irrespective of the contract itself. Were it otherwise, it would be a simple matter to remove from the jurisdiction of the Board all unfair labor practice disputes, by the facile device of prohibiting in the collective-bargaining contract all unfair labor practices defined in the Act.

The disputed provisions of the collective-bargaining agreement at bar clearly present quite a different situation from that just discussed. Here, the parties have arguably agreed affirmatively to permit conduct which, sans contract, the Act would admittedly condemn as an unfair labor practice. The resulting controversy then, as to whether the provisions of the contract positively sanction the action complained of, is a matter for arbitration where, as in *Square D.*, the collective-bargaining agreement so provides, or for adjudication by the Courts; and hence is beyond the subject-matter jurisdiction of the Board. This is necessarily so because, under the circumstances at bar, the very existence of the alleged unfair labor practice is "*dependent* upon the resolution of a preliminary dispute involving *only* the interpretation of the contract". [*Square D. Company* v. *N.L.R.B.*, *supra*, 332 F. 2d at 365-366.]

Since the Board has no jurisdiction to enforce collective bargaining agreements as such, both reason and policy dictate that adjudication of disputes, as to the scope of contractual rights and obligations, be by tribunals empowered to compel compliance with them.

As declared in *N.L.R.B.* v. *American National Ins. Co.*, 343 U.S. 395 (1952), "the Board may not, either directly or indirectly, . . . sit in judgment upon the substantive terms of collective bargaining agreements". [343 U. S. at 404; see also: *Dowd Box Co., Inc.* v. *Courtney, supra*, 368 U. S. at 510-513; *Square D. Company* v. *N.L.R.B., supra*, 332 F. 2d at 366; *In Re Morton Salt Co.*, 119 N.L.R.B. 1402, 1403 (1958); *In Re United Tel. Co. of the West*, 112 *N.L.R.B.*, 779, 781-782 (1955).]

Here, as in *N.L.R.B.* v. *Nash-Finch Co.*, 211 F. 2d 622 (8th Cir. 1954):

> "It seems to us that what the Board has done, under the guise of remedying unfair labor practices, is to attempt to bestow . . . benefits which it believes the Union should have obtained but failed to obtain . . . as a result of its collective bargaining with the respondent . . . ." [211 F. 2d at 627.]

Undeniably, the specific controversy at bar is whether the respondent or the union has correctly interpreted the quoted provisions of Section A of Article XVII of the collective-bargaining agreement. Moreover, since the nature of the controversy is such that the existence or non-existence of an unfair labor practice does not turn entirely upon the provisions of the Act, but arguably upon a good-faith dispute as to the correct meaning of the provisions of the collective-bargaining agreement, the Courts have jurisdiction. [*Square D. Company* v. *N.L.R.B., supra*, 332 F. 2d 360.] Although this may in some cases unavoidably delay exercise of the Board's unquestioned jurisdiction under § 10(a) of the Act to control unfair labor practices affecting commerce [29 U.S.C. § 160(a)], such a rule will not operate to encroach upon that jurisdiction.

For the reasons stated, the Board's petition to enforce the challenged order is denied, and the matter is remanded to the Board with directions to vacate the order and to dismiss the complaint, and all unfair-labor-practice proceedings herein, for lack of the Board's present jurisdiction over the subject matter.

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19,769

DECREE

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

C & C PLYWOOD CORPORATION, RESPONDENT

Before: BARNES and KOELSCH, Circuit Judges, and MATHES, District Judge.

This cause came on to be heard upon the petition of the National Labor Relations Board, filed December 21, 1964, to enforce an order of said National Labor Relations Board issued by it on August 24, 1964, against the respondent, its officers, agents, successors and assigns, and of the answer, filed January 8, 1965, to said petition.

The court heard argument of respective counsel on July 9, 1965, and has considered the transcript of record and briefs filed in this cause.

On September 10, 1965, the court being fully advised in the premises, handed down its decision, and in conformity thereto,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that the petition of the National Labor Relations Board be, and hereby is denied, and that this case be, and hereby is remanded to the said Board with directions to vacate the order and to dismiss the complaint, and all unfair-practice proceedings herein for lack of the Board's present jurisdiction over the subject matter.

(Endorsed) Decree.
Filed and Entered September 10, 1965.
Frank H. Schmid, Clerk

APPENDIX B

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 19-CA-2686

C & C PLYWOOD CORPORATION

and

PLYWOOD, LUMBER AND SAWMILL WORKERS LOCAL UNION No. 2405, AFL-CIO

DECISION AND ORDER

On January 3, 1964, Trial Examiner Maurice M. Miller issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in unfair labor practices and recommending that the complaint be dismissed in its entirety, as set forth in the Trial Examiner's Decision attached hereto. Thereafter, the General Counsel and the Charging Party each filed exceptions to the Decision and a supporting brief. Respondent filed a brief in support of the Decision.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in the case, and finds merit in the exceptions. Accordingly, the Board adopts only so much of the findings, conclusions, and recommendations of the Trial Examiner as are consistent with this Decision.

On May 1, 1963, Respondent and the Union entered into a collective-bargaining agreement effective to October 31, 1963. The agreement contained a wage clause in Article XVII which stated in part:

> The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude, or the like.

On May 20, 1963, Respondent posted a notice announcing that effective immediately and "for the next couple of months," members of the glue spreader crews would receive premium pay provided that they met certain production standards.[1]

Respondent formulated and placed in effect the premium pay schedule without prior notice to, or bargaining with, the Union. About a week later the Union learned of the plan from one of its members. By letter dated May 27, the Union asked Respondent for a conference to discuss the premium pay notice. In the letter, the Union said:

> We do not consider this to be premium pay within the meaning of Article XVII, but rather a change in wages made dependent upon a production basis rather than hourly rates agreed upon with the Union.

The parties met on June 7 and 15, 1963. The Union requested rescission of the plan. Respondent refused although it offered to discuss terms of the plan. The Union then filed the present unfair labor practice charges alleging that Respondent had unlawfully re-

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[1] The contract rates of pay for members of the glue spreader crew were: core feeder, $2.24; core layer, $2.29; sheet turner, $2.15. The premium pay schedule provided for an hourly rate of $2.50 to each member of the crew.

fused to bargain by unilaterally establishing the premium pay plan.

The Trial Examiner found that the dispute between the Union and Respondent involved only a disagreement as to the meaning of terms of a collective-bargaining contract and that the promulgation of the premium pay plan according to Respondent's understanding of those terms was not a violation of Section 8(a)(5). We disagree.

In filing its unfair labor practice charge, the Union was complaining not of a violation of its contract with Respondent, but of the invasion of its statutory right as collective-bargaining representative of employees in the unit to bargain about any change in the terms and conditions of employment for such employees.[2] *Prima facie*, Respondent's change in the terms for compensating glue spreader crews without notification to, or bargaining with, the Union violated Section 8(a)(5).[3] The Board has recognized, however, that the statutory right of a union to bargain about changes in terms and conditions of employment may be waived by the union. Respondent's affirmative defense to the *prima facie* case is that there was such a waiver in this case. It contends: (a) during the contract negotiations, the Union waived its right to be consulted about group incentive pay; and (b) the

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[2] *Timken Roller Bearing Co.* v. *N.L.R.B.*, 325 F. 2d 746 (C.A. 6); *Smith Cabinet Mfg. Co., Inc.*, 147 NLRB No. 168. This is not a case like *United Telephone Company of the West*, 112 NLRB 779, or *Morton Salt Company*, 119 NLRB 1402, relied upon by the Trial Examiner, where an alleged breach of contract was the very basis for the 8(a)(5) allegation in the first case, and for the 8(a)(1) and (2) allegations in the second.

[3] *N.L.R.B.* v. *Katz*, 369 U.S. 736.

wage clause in the contract gave the Respondent the right unilaterally to put into effect a wage incentive plan.

In order to determine the validity of this waiver defense, the Board must necessarily evaluate the testimony as to what occurred during contract negotiations, and must interpret the wage clause of the contract. We find no obstacle to either course. The Board is not unfamiliar with the problems of contract construction. For example, it is frequently required to construe contracts in representation cases when a contract is claimed to be a bar to a representation petition, and in unfair labor practice proceedings involving the meaning and validity of union-security clauses, or clauses alleged to be violative of Section 8 (e). Moreover, this is not a case where the identical question of contract construction is pending before a civil court or an arbitrator and in the interests of comity, the Board defers to the other tribunal.[4] Accordingly, we reject the argument that, because determination of the validity of the defense involves construction of the collective-bargaining contract, the complaint alleging an 8(a)(5) violation should be dismissed.[5]

(a) Waiver of a statutory right will not lightly be inferred. The relinquishment to be effective must be "clear and unmistakable."[6] Or as the Board said in the *Proctor Manufacturing* case:[7]

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[4] See *National Dairy Products Co.*, 126 NLRB 434; *United Telephone Company of the West, supra.* The contract between the Union and Respondent contains no provision for arbitration.

[5] *Smith Cabinet Manufacturing Company, Inc., supra.*

[6] *Timken Roller Bearing Co.* v. *N.L.R.B., supra.*

[7] *Proctor Manufacturing Co.*, 131 NLRB 1166, 1169.

> The Board's rule, applicable to negotiations during the contract term with respect to the subject which has been discussed in precontract negotiations but which has not been specifically covered in the resulting contract, is that the employer violates Section 8(a)(5) if, during the contract term, he refuses to bargain or takes unilateral action with respect to the particular subject, unless it can be said from an evaluation of the prior negotiations that the matter was "fully discussed" or "consciously explored" and that the Union "consciously yielded" or clearly and unmistakably waived its interest in the matter.

In the present case, the Trial Examiner found that during contract negotiations, Respondent's negotiator mentioned that Respondent was "giving thought" to the possibility of promulgating a premium pay or incentive wage program for glue spreader crews. This alone, although in the context of a resulting contract which does not "specifically cover" a group incentive pay plan, is not a waiver by the Union under the above standard. In addition, we believe that any conclusion that the Union "consciously yielded" on the *group* suggestion made by the Respondent is negated by the inclusion in the contract of a specific provision for *individual* premium pay. Moreover, the Trial Examiner found that this comment was made at a bargaining session when the parties had reached an impasse over the hourly rates for the three job classifications which constituted the glue spreader crews.

Accordingly, we find that there is not sufficient evidence under the above standard to establish that the Union waived its right to bargain about a wage incentive system.

(b) The wage clause gives Respondent the right to pay a premium rate to "reward any particular em-

ployee for some special fitness, skill, aptitude, or the like." It seems to us that this clause grants the Employer the right to make individual merit increases for special competence or skill. We do not construe it, as Respondent apparently does, to authorize Respondent to select a group of employees and unilaterally change the method of compensating them from a straight hourly basis, with a fixed rate for each job category, to what is in effect a production basis, by raising the hourly contract wage rate contingent upon increased productivity. To accept Respondent's construction is tantamount to saying that the Union inferentially surrendered to Respondent the right unilaterally to establish production standards and wage rates based thereon as a method for compensating employees. Such an intent is so contrary to labor relations experience that it should not be inferred unless the language of the contract or the history of negotiations clearly demonstrates this to be a fact. We see nothing in these negotiations or this contract to establish that the Union intended to waive its statutory right to bargain over the matter in dispute. The Union's prompt protest against Respondent's posting of the new wage schedule also belies any such intent.

Accordingly, we find that by unilaterally changing the wage rates for members of the glue spreader crews Respondent violated Section 8(a)(5) and (1) of the Act.

The effect of the unfair labor practice upon commerce

The conduct of the Respondent set forth above, occurring in connection with the operations of Respondent as set forth in Section I of the Trial Examiner's Decision, has a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tends to lead to labor disputes burdening

and obstructing commerce and the free flow of commerce.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom, and from like or related conduct, and that it take certain affirmative action to effectuate the policies of the Act.

Conclusions of Law

1. C & C Plywood Corporation is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. Plywood Lumber and Sawmill Workers Local Union No. 2405, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By instituting a premium pay plan for glue spreader crew workers without notice to, or bargaining with, the Union, Respondent violated Section 8(a)(5) and (1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to bargain collectively with Plywood, Lumber and Sawmill Workers Local Union No. 2405, AFL-CIO, as the exclusive representative of

its employees in the appropriate bargaining unit,[8] by unilaterally instituting a premium pay plan for glue spreader crews or otherwise changing any term or condition of employment of employees within the aforesaid unit without prior notice to, and bargaining with, the Union.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act.

(a) Upon request, bargain with Plywood, Lumber, and Sawmill Workers Local Union No. 2405, AFL-CIO, with respect to the institution of a premium pay plan for glue spreader crews and, if requested by said Union, rescind any plan which Respondent may have unilaterally instituted.

(b) Post in its plant in Kalispell, Montana, copies of the notice attached hereto marked "Appendix."[9] Copies of such notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by an authorized representative of Respondent, be posted immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including

---

[8] The appropriate unit is composed of all production and maintenance employees of the Respondent at its veneer and plywood plants near Kalispell, Montana, excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

[9] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Nineteenth Region, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D. C., August 24, 1964

Frank W. McCulloch, Chairman

John H. Fanning, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Member Leedom, dissenting:

Unlike my colleagues, I would affirm the Trial Examiner for the reasons indicated in his Decision. As the Trial Examiner there points out, the Board has long held that it will not effectuate the policies of the Act for it to police collective-bargaining agreements by attempting to resolve disputes over their meaning, whatever a proper construction of the disputed language in the contract may be, where it is evident that the Respondent acted reasonably and in good faith.

In such cases, the aggrieved party's remedy is to seek judicial or other enforcement of the contract.

As the Trial Examiner found, this is precisely such a case. My colleagues do not purport to depart from the *United Telephone* case, 112 NLRB 779, relied on by the Trial Examiner here, where the Board applied this salutary rule. Contrary to my colleagues, the case at bar differs in no significant respect from *United Telephone*.[10] There, as well as here, the employer, *prima facie*, violated the Act by unilaterally changing terms or conditions of employment; in both cases, the terms of the contract at least colorably justified the employer's good-faith making of the change; and here, as well as there, the parties disagreed with respect to the meaning of the contract, and a determination as to whether the employer violated the Act turns upon a proper construction of the contract. In these circumstances, the Union's remedy is before another forum.

Accordingly, like the Trial Examiner, I would dismiss the complaint.

Dated, Washington, D. C.

Boyd Leedom, Member

NATIONAL LABOR RELATIONS BOARD

[10] While it is true that the pendency of a civil suit calling for interpretation of the contract was an additional reason for dismissal of the complaint in *United Telephone*, the fact that, here, no such suit is pending and there is no provision in the contract for arbitration, does not alter the established rule that the Board is not the proper forum to remedy a breach of contract or to obtain specific performance of its terms.

APPENDIX [TO BOARD DECISION]

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT fail or refuse to bargain collectively with PLYWOOD, LUMBER AND SAWMILL WORKERS LOCAL UNION NO. 2405, AFL-CIO, by unilaterally instituting a premium pay plan for glue spreader crews or otherwise changing any term or condition of employment in the unit composed of:

All production and maintenance employees at our veneer and plywood plants near Kalispell, Montana, excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

C & C PLYWOOD CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 327 Logan Building, 500 Union Street, Seattle, Washington, 98101 (Tel. No. MUtual 2-3300), if they have any question concerning this notice or compliance with its provisions.

APPENDIX C

The relevant provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C., 151, *et seq.*) are as follows:

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

* * * * * *

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

Sec. 10.(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * *

TITLE II—CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECTING COMMERCE; NATIONAL EMERGENCIES

* * * *

Sec. 203. * * * (d) Final adjustment by a method agreed upon by the parties is hereby de-

clared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

* * * * * *

TITLE III—SUITS BY AND AGAINST LABOR ORGANIZATIONS

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * * * *

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No. 8453

In the Supreme Court of the United States

OCTOBER TERM, 1965

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

C & C PLYWOOD CORPORATION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 884

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

C & C PLYWOOD CORPORATION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

The Respondent, C & C Plywood Corporation, herewith submits its brief in opposition to the grant of a writ of certiorari in this matter.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is officially reported at 351 F. 2d 224 (Sept. 10, 1965) and appears in the Advance Sheet of that Reporter for November 22, 1965.

JURISDICTION

This matter arises out of an allegation of unfair labor practices made to the National Labor Relations Board

which is wholly dependent upon the interpretation to be placed upon an existing, valid and binding collective bargaining contract. The law is clear, as is hereafter shown, that the Board is and was without jurisdiction. The absence of jurisdiction in the first instance, which was confirmed by the Court of Appeals for the Ninth Circuit in this matter, defeats all subsequent jurisdiction with respect to that subject matter. On the other hand, of course, this Court has jurisdiction over the Board and the Court of Appeals under Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. 160(e) and 28 U.S.C. 1254.

QUESTION PRESENTED

The Respondent believes that the question presented in the Petition fails to point up the important fact that this matter arises wholly and solely out of the Board's interpretation, and incidentally a patently strained and circuitous interpretation, placed upon an existing, valid and binding collective bargaining agreement. The provision interpreted was not illegal or contrary to public policy, *per se*. The action taken by the Respondent under that contract was reasonably within the scope of the provision relied upon by it. Thus, the Respondent believes the question should be stated in substantially the following terms:

After the parties have entered into a written collective bargaining agreement resolving all outstanding bargaining issues between them, and that contract, among other things, provides for a grievance procedure to resolve issues arising under it, and also provides that the employer may, without further notice or negotiations, adjust wages up-

ward, does the exercise of this latter right by the employer, without more, provide the National Labor Relations Board with jurisdiction to enter into a dispute over whether or not the contract permitted such conduct under the guise that an unfair labor practice occurred?

STATUTES INVOLVED

In addition to those statutes cited by the Petitioner, attention of the Court is directed to the history of the National Labor Relations Act, as amended. (29 U.S.C. 151, *et seq.*) Specific reference is made to the failure and refusal of the Congress to make the violation of a collective bargaining agreement an unfair labor practice although such a provision was included as Sections 8(a)(6) and 8(b)(5) of Senate Bill 1126 and the Senate-passed version of H. R. 3020. Attention is also directed to the admonition of the Conference Committee in its report that "once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law *and not to the National Labor Relations Board.*" (H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42; italics supplied for emphasis.)

Attention is also directed to Section 8(d) of the National Labor Relations Act, as amended (29 U.S.C. 158(d) which defines the phrase "to bargain collectively" and is set out in Appendix A, *infra*, at page 25 of this brief.

STATEMENT OF THE CASE

The Respondent accepts the Statement of the Case appearing at pages 2 through 6 of the Petition with the following supplemental matter.

While there was no arbitration provision in the collective bargaining agreement, the parties did provide for a relatively comprehensive grievance procedure for the resolution of differences that might arise under their collective bargaining contract. That grievance procedure is set out in Appendix B, *infra*, at page 27 of this brief.

The Respondent Company formulated and placed into effect its premium pay plan pursuant to paragraph A of Article XVII of the collective bargaining agreement wherein it is stated:

> "• • • The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like. • • •"

The specifics of the plan and how it met the provisions of the collective bargaining agreement are omitted from this brief as unnecessary to the disposition of the Petition herein.

The Statement of the Case in the Petition fails to point out that the Trial Examiner assigned by the Board in the first instance to hear this matter, by his Decision, recommended that the matter be dismissed, finding in the process:

> "Substantially, therefore, this case reflects a dispute with respect to the scope of Respondent's contractually-reserved right to pay a premium rate conditioned upon the firm's desire to reward particular workers possessed of certain qualifications. General Counsel's complaint charges no statutory violation severable from this dispute between Respondent and

> the Charging Party, derived entirely from their conflicting contract interpretations." (R. 23)

The Trial Examiner then quoted with approval from a prior Board decision[1] as follows:

> "Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years, with the approval of the courts: '* * * it will not effectuate the statutory policy* * *for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act.'" (R. 23-24)

The decision of the Court of Appeals also holds that the National Labor Relations Board has no jurisdiction to adjudge an unfair labor practice where the existence of the unfair labor practice is solely dependent upon the resolution of a preliminary dispute involving only the interpretation of an existing, valid and binding collective bargaining agreement.

The Court of Appeals observed that the only way the Board reached its decision, rejecting the Trial Examiner's decision, was to construe the collective bargaining contract. It also pointed out that in construing the contract, the Board found the provisions involved "so contrary to labor relations experience" that the union should never have executed such a contract; and since the provisions in question should never have been agreed to by the union, it must be

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[1] *In re United Telephone Company of the West*, 111 NLRB 779 (1955).

presumed that the union did not intend them, since the union's "prompt protest against Respondent's posting of the new wage schedule . . . belies such intent." This illustrates conclusively the erroneous usurpation of jurisdiction by the Board.

The meat of the issues presented by the Petition is disposed of by the Court of Appeals in the following discourse found in its decision:

> "Where the disputed provisions of a collective-bargaining agreement do no more than affirmatively prohibit conduct already defined and forbidden by the Act as an unfair labor practice, the Board can never be ousted of jurisdiction, for the reason that the controversy would involve no more than a breach of these negative contract provisions—a violation of duty already 'imposed directly by the Act,' irrespective of the contract itself. Were it otherwise, it would be a simple matter to remove from the jurisdiction of the Board all unfair labor practice disputes, by the facile device of prohibiting in the collective-bargaining contract all unfair labor practices defined in the Act.
>
> "The disputed provisions of the collective-bargaining agreement at bar clearly present quite a different situation from that just discussed. Here, the parties have arguably agreed affirmatively to permit conduct which, sans contract, the Act would admittedly condemn as an unfair labor practice. The resulting controversy then, as to whether the provisions of the contract positively sanction the action complained of, is a matter for arbitration where, as in *Square D.*,[2] the collective-bargaining agreement so provides, or for adjudication by the Courts; and hence is beyond the subject-matter jurisdiction of the Board. This is necessarily so because, under the circumstances at bar, the very existence of the alleged unfair labor practice is '*dependent* upon the resolution of a preliminary dispute involving

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[2]*Square D Co. v. National Labor Relations Board*, 332 F. 2d 360 (C. A. 9, 1964)

only the interpretation of the contract.'" * * *" (*National Labor Relations Board v. C. & C Plywood Corporation*, 351 F. 2d 224 at p. 227.)

REASONS FOR DENYING WRIT

1. The law in this matter is clear and has been uniformly applied by the Courts and the Board until very recently when the Board, reconstituted under a new executive administration, began to deviate from this long established precedent. The law is as set out in the two paragraphs quoted last from the decision of the Court of Appeals in this matter.

As early as 1936, under the original National Labor Relations Act, the Board held in *In re Consumer's Research, Inc.*, 2 NLRB 57, 74:

> "The Board has no power under the Act to decide upon the subject matter or substantive terms of a union agreement."

That has continued to be the position of the Board, in substance, for many years, including but not limited to such decisions of the Board as *In re Consolidated Aircraft Corporation*, 47 NLRB 694 (1943); *In re Jacobs Manufacturing Co.*, 94 NLRB 1214 (1951); *In re Crown Zellerbach Corp.*, 95 NLRB 753 (1951); *In re Textron Puerto Rico*, 107 NLRB 583 (1953); *In re McDonnell Aircraft Corporation*, 109 NLRB 930 (1954); *In re United Telephone Co. of the West, supra; In re Spielberg Co.*, 112 NLRB 1080 (1955); *In re Knight Morley Corp.*, 116 NLRB 140 (1956) in which the principle was recognized but decided on other grounds; *In re Morton Salt Co.*, 119 NLRB 1402

(1958); *In re National Dairy Products Corp.*, 126 NLRB 434 (1960); and, *In re Hercules Motor Corporation*, 136 NLRB 1648 (1962). In each of the cases, where applicable, it was clear that the contractual provision involved was not *per se* repugnant to the purposes and policies of the Act and such is true of the contract clause involved in the contract at bar. In some of the cases, the employer was found to have committed an unfair labor practice but on grounds completely independent of and unrelated to the contractual provision involved. In some of the cases the Board termed its action as "declining" or "refusing" to exercise its jurisdiction as though such jurisdiction did in fact exist. However, the result in either event was the same and no inconsistent body of precedent developed. It all came back to this basic tenet which is repeated in several of the Board cases:

> "• • • It will not effectuate the statutory policy • • • for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act."

There is no reason or basis upon which to change the law.

This aspect of the law is fully discussed, with special attention to the Board's policy in this regard, in *Sinclair Refining Company v. National Labor Relations Board*, 306 F. 2d 569 (C. A. 5, 1962). The Court reviewed the legislative history of the statute involved and the decisions of this Court and concluded:

"These cases establish three main things. First, since a breach of contract as such does not constitute an unfair labor practice, determination of such a dispute is not ordinarily for the Board. Second, resolution of these disputes, important as this is to the maintenance of industrial peace, is for the ordinary processes of the law. And third, where the parties have prescribed a voluntary grievance procedure for settlement of such controversies, Courts are to (a) enforce them fully and (b) stay out of the determination of the intrinsic merits under the guise of determining arbitrability." (306 F. 2d at p. 576.)

The Court continued at page 577:

"* * * While Congress has, of course, presumably infused an expertise in the members of the Labor Board with respect to matters committed to its jurisdiction, Garner v. Teamsters, Chauffeurs and Helpers Local Union, 1953, 346 U.S. 485, 490, 74 S. Ct. 161, 98 L. ed. 228, it has 'expressly rejected that policy with respect to violations of collective bargaining agreements * * *' Charles Dowd Box Co., Inc. v. Courtney, 1962, 368 U.S. 502, 82 S. Ct. 519, 7 L. ed. 483, 490. Those controversies are left 'to the usual processes of the law.' The processes of the law are, of course, either traditional court action or the grievance machinery where established."

The Court noted that its decision was not hostile to the policy which the Board, itself, followed with rare exceptions. The Court referred to the Board's *Hercules Motor Corporation* case, *supra*, using it to illustrate the Board's own policy of declining to interpret the collective bargaining agreement of the parties.

The Petition seeks to establish that the law in this area is unclear by the Petitioner's own departure from estab-

lished precedent and the clear law of this subject. The Petitioner alleges the conflict by citing three very recent decisions of the Board itself.[3] We do not believe that this Court will let itself be used by the National Labor Relations Board in an attempt to circumvent the established law and the Congressional intent so clearly manifested in the decisions of this Court, more fully discussed herein.

The Board also attempts to inject a new premise. That premise is that the Board deems itself to be the interpreter of a labor contract when the contract contains no arbitration procedure. It is the view of some eminent authorities that it is most desirable that the collective bargaining agreements of employers and unions provide a grievance procedure which ultimately results in final and binding arbitration. There are other eminent authorities, however, that argue that final and binding arbitration is not all as desirable as it would appear but that the best solution is one of collective bargaining through an orderly procedure provided for in the agreement of the parties. It so happens that in the case at bar the parties preferred the latter course to a grievance procedure that resulted in the ultimate decision of a third party who frequently knows little of the plant, industry or personnel involved in the grievance without the right of an appeal. *Nowhere in the Act* or *under any decision of this or any other Court* has the Board acquired jurisdiction to solve a contractual dispute simply because the parties voluntarily chose not to include an arbitration provision as the ultimate means for resolving their differences under the contract.

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[3] *In re Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410 (1964); *In re Smith Cabinet Mfg. Co., Inc.*, 147 NLRB 1506 (1964); and, *In re Century Papers, Inc.*, 155 NLRB No. 40 (1965)

By injecting itself into a dispute wholly determined by the interpretation of a contract, the Board accomplishes by indirection that which it has been told it cannot do by direction of Congress. And Congress, by its refusal to make the violation of labor contracts an unfair labor practice made it clear that the Board was without jurisdiction to interfere in the administration or enforcement of such agreements.

Where the unfair labor practice, if one exists, is solely and wholly dependent upon a contract interpretation, and the provision of the contract to be interpreted is not *per se* contrary to public policy as shown by the Act, there are not duplicate remedies, that is, one, before the Board, or, two, under the contract, as the Petitioner would lead us to believe, since the Board is without jurisdiction, as is noted herein.

The Board claims its authority is found under Section 10(a) (29 U.S.C. 160(a)) of the Act. However, Section 10(a) specifically states:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (*listed in Section* 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise:* * *" (Italics for emphasis.)

The Board's power, upon which it here relies, has been clearly confined by Congress to "any unfair labor practice" further qualified as "listed in Section 8." Nowhere has Congress listed the violation of an existing, valid and bind-

ing collective bargaining agreement as an unfair labor practice. To the contrary, as this Court has pointed out time and again, the Congress made it clear that "once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."

The language of Section 10(a) contemplates an independent unfair labor practice, wholly unrelated to the valid provisions of a collective bargaining agreement. This is further illustrated by the Conference Report which was prepared in connection with this legislation. That Report states in part:

> "• • • By retaining the language which provides the Board's powers under Section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of other remedies." (H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 52.)

Attention is also directed to the unfair labor practice charge under which the Board seeks to gain jurisdiction, namely, that the employer refused "to bargain collectively." That terminology when read in view of Section 8(d) of the Act (see Appendix B to this brief) makes it abundantly clear that the Board has clearly overstepped its bounds of jurisdiction. If any doubt remains, one need but examine the legislative history of this section of the Act and the dissatisfaction expressed by Congress to the manner in which the Board had expanded its jurisdiction under the original

Act in the absence of terms limiting the purview of the phrase "to bargain collectively."[4]

Thus, for the Board to here cause itself to be injected into the interpretation of collective bargaining agreements which would be the sole basis upon which an unfair labor practice could stand would be in direct conflict with the long standing decisions of Courts pertaining to this matter and in derogation of the clear intent of Congress.

There can be no doubt that the Board seeks, through this case, to expand its jurisdiction beyond the permissive bounds of the legislation enabling its existence. This is readily determined from the Petition itself. On page 8 it implies that in the absence of an arbitration procedure in the contract the Board acquires a jurisdiction that might not be there with such a procedure. There is no basis in either the legislation or the precedent thereunder to support such an improper grasp for jurisdiction.

The last paragraph of the first reason given for granting the Petition in the Petition is a clear example of the Board's attempt to expand its jurisdiction. That paragraph alone should defeat the Petition as its thrust is clearly inimical to the legislation passed by Congress and the intent manifested by that legislation. To grant the Board's claim of authority would put it squarely in the business of interpreting, enforcing and litigating the terms of collective bargaining agreements.

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[4]See House Report No. 245 on H.R. 3020, 80th Cong. 1st Sess., pp. 19-23. The Report, after citing examples of unreasonable expanding Board jurisdiction commented at page 20: "These cases show that unless Congress writes into law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective bargaining agreements. * * *"

It is impossible to understand how the Petition can say that the contract determination here was "wholly incidental to its unfair labor practice determination" when without that clearly strained interpretation, no unfair labor practice could have conceivably existed or been implied. An additional important point is that the Board does admit that it has engaged in solving a "labor dispute" based upon the construction to be placed upon the collective bargaining agreement. The Board justifies this usurpation of power because it claims it operates "with maximum dispatch." This is, of course, a questionable, self-serving declaration and serves little or no other function. Nothing more need be said to illustrate the total incompatibility of the Board view with both the legislation and the legislative intent under which it exercises a limited statutory authority as well as the law as elucidated by this Court and the various Courts of Appeal.

Simply in passing it should be noted that the parties to a collective bargaining agreement have many avenues of recourse available to them for the resolution of their contractual difficulties, any one of which is far superior to use of the Board. The first is to work the problem out through free and unfettered collective bargaining. This can be aided, as the parties have in the case at bar, by the use of the Federal Mediation and Conciliation Service. Voluntary settlement of disputes has long been the goal of our national labor policy. The parties are also free to resort to the Courts for enforcement or an interpretation. The Courts are frequently felt to be more qualified in this area because it is believed that they are far more objective and impartial and rely more upon sound and tested rules of

construction and experience than are available through labor arbitrators of limited experience whose views may only too often be of much less depth or understanding. And, if one does get a rare decision from the Courts which is believed improper, the right to appeal is inviolate. Seldom is there an appeal from a bad arbitration decision unless that decision is clearly outside the issue presented to the arbitrator. Furthermore, there is nothing to prevent the parties who decline to make arbitration the contractually accepted determinant of issues under the contract, from voluntarily submitting an issue to an *ad hoc* arbitration. Such is usually the recommendation of the Federal Mediator in any situation in which he ultimately believes he cannot bring the parties together in resolution of their difficulties through free collective bargaining. Thus, it can be seen that the Board's offer of assistance in a matter of this sort is both unneeded and undesirable.

2. There is no conflict between the decision of the Court of Appeals in this matter and the announced precedent of this Court. This Court has held time and again, after a review of the legislative history of the National Labor Relations Act, as amended, that Congress has made it abundantly clear that a violation of a collective bargaining contract is not an unfair labor practice.

The Board admits it cannot enforce contracts directly. It then here examines the contract and places a clearly strained interpretation on the contractual provision relied on. The Board thus accomplishes the very result it admits it cannot legally do otherwise. The Board's reasoning is untenable.

One of the earliest ennunciations of this Court in this area is found in *Terminal Railroad Assn. v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6 (1943). Therein Mr. Justice Jackson speaking for a unanimous Court said:

> "The Railway Labor Act [45 U.S. C. Sec. 151 *et seq.*] like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them * * * So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. * * *"

This Court in *National Labor Relations Board v. American National Insurance Company*, 343 U.S. 395 (1952) at page 401 stated:

> "*First.* The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours, and working conditions which are incorporated in an agreement. The theory of the Act is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively."

Continuing at page 404, this Court concluded:

"Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. *And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.*" (Italics supplied for emphasis.)

The decision of the Court of Appeals here is also in conformity with the interpretation placed upon the National Labor Relations Act, as amended, by this Court in *Dowd Box Co., Inc. v. Courtney,* 368 U.S. 502 (1962). In that case this Court reviewed the history of Section 301 of the Labor Management Relations Act and observed at page 510:

"The bill which the Senate originally passed the following year contained a provision making a breach of a collective bargaining agreement an unfair labor practice subject to the jurisdiction of the National Labor Relations Board, S. 1126, 80th Cong., 1st Sess., Secs 8(a)(6), 8(b)(5), as well as a provision conferring jurisdiction upon the federal courts over suits for violation of collective agreements. In conference, however, it was decided to make collective bargaining agreements enforceable *only* in the courts. 'Once parties have made a collective bargaining contract,' the report stated, 'the enforcement of that contract should be left to the usual processes of the law *and not to the National Labor Relations Board.*' H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42." (Italics supplied for emphasis.)

The delineation is made precise by this Court at page 513 of that decision:

"This Court, in holding that the Labor Management Relations Act of 1947 operates to withdraw from the

jurisdiction of the States controversies arguably subject to the jurisdiction of the National Labor Relations Board, has delineated the specific considerations which led to that conclusion:

> 'Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.' *Garner v. Teamsters Union*, 346 U.S. 485, 490.
>
> "By contrast, Congress expressly rejected that policy with respect to violations of collective bargaining agreements by rejecting the proposal that such violations be made unfair labor practices. Instead, Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.'"

The view of this Court is not only supported by H. R. Conf. Rep. No. 510, 30th Cong., 1st Sess., but also by remarks of Senator Taft as the Manager of the Senate Conferees to the Conference Committee. For example, when Senator Taft was presenting the Conference Bill to the Senate he observed:

> "When the bill passed the Senate it also contained a sixth paragraph in this subsection which made it an unfair labor practice for an employer to violate the terms of a collective-bargaining agreement or the terms

> of an agreement to submit a labor dispute to arbitration. The House conferees objected to this provision on the ground that it would have the effect of making the terms of every collective agreement subject to interpretation and determination by the Board, rather than the courts. The Senate conferees ultimately agreed to its elimination as well as the deletion of a similar provision contained in subsection 8(b)(5) of the Senate amendment which made it an unfair labor practice for a labor organization to violate the terms of collective bargaining agreements. The provisions of the Senate amendment which conferred a right of action for damages upon a party aggrieved by breach of a collective bargaining contract, however, were retained in the conference agreements (Section 301). If both provisions had remained, there would have been a probable conflict of remedies and decisions." (93 Daily Cong. Rec. 6600, June 5, 1947.)

While the ultimate thrust of the decision in *Association of Salaried Employees v. Westinghouse Electric Corporation*, 348 U.S. 437 (1955) has been substantially set aside by the holding of this Court in *Smith v. Evening News Association*, 371 U.S. 195, 199, (1962), the comment of this Court in the *Westinghouse* case at note 2 beginning on page 443 has been in no way disturbed and, in fact, has been sustained in the *Dowd Box Co.* case. This Court said:

> "• • • It is significant, however, that breach of contract is not an 'unfair labor practice.' A proposal to that end was contained in the Senate bill, but was deleted in conference with the observation: 'Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.' • • •"

This Court again reviewed this history and affirmed that premise in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) at page 452.

The rule was stated in yet another manner by this Court in *Local 1976, United Brotherhood of Carpenters v. National Labor Relations Board*, 357 U.S. 93 (1958):

> "* * * But the Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice. * * *"

And this view is wholly compatible with this Court's famous trilogy of decisions.[5] In those cases this Court emphasized the necessity for compliance with the admonition of Section 203 (d) of the Labor Management Relations Act, 1947, [61 Stat. 154, 29 U.S.C. Sec. 173 (d)] which states: "Final adjustment by a method *agreed upon by the parties* is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement..." This Court said: "That policy can be effectuated only as the means *chosen by the parties* for settlement of their differences under a collective bargaining agreement is given full play." (363 U.S. at p. 566. Italics supplied for emphasis.) In neither the statute nor the Court's interpretation of it is the National Labor Relations Board directly or indirectly permitted to substitute itself for the grievance procedure of the labor contract simply

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[5] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

because it believes it should become the arbiter if none is provided for on a permanent basis specifically by the parties.

The Petitioner apparently seeks to base its belief that the writ should be granted on an alleged difference between the rule announced by the Court of Appeals in this matter and the rules enforced by this Court in *Smith v. Evening News Association, supra,* and *Carey v. Westinghouse Electric Corporation,* 375 U.S. 261 (1964) while nevertheless having the boldness to admit that the judicial determinations there "were made in a context slightly different from that at bar." (Pet. p. 9) The Petition itself illustrates the total inapplicability of these two cases it cited as possibly conflicting by observing:

> "Furthermore, in those cases no question of contract interpretation would have had to be resolved by the Board for it to determine whether an unfair labor practice had been committed. * * * Hence, in exercising jurisdiction, the Board was compelled to interpret the contract – as would not have been necessary in *Smith* or *Carey.*" (Pet. pp. 9-10.)

The Petition disposes of its reference to *Local 174, Teamsters v. Lucas Flour Co.,* 369 U.S. 95 (1962) by noting that it involved a question which on its face has no relationship to the matter here at bar. (Pet. p. 9.)

By its very admission, the Petition fails to find any decision of this Court in conflict with the principles applied by the Court of Appeals in this case. The inference is improperly made to this Court that conflicting decisions may exist by use of the phrase that the decision of the court be-

low "appears" to be in conflict with applicable decisions of this Court. (Pet. p. 7.) As a matter of fact, the decisions of this Court cited by the Petitioner are wholly compatible with the decision of the Court of Appeals in this case.

In the first of the Petitioner's cited cases, the *Lucas Flour* case, this Court affirmed the views it expressed in the *Dowd Box Co.* case, *supra*, and reiterated the history of this legislation which makes it clear that "Congress 'deliberately chose to leave the enforcement of collective agreements to the usual processes of the law.'" (369 U.S. 95 at 101 n.9.)

In the *Evening News* case cited by the Petitioner, this Court made it clear that the Board had jurisdiction "where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice." This was true without regard to the provisions of the collective bargaining contract.

The same was also true with respect to the *Carey v. Westinghouse* decision cited by the Petitioner.

Thus, there is no conflict between the decisions of this Court cited by the Petitioner and the Court of Appeals in the matter here at bar.

3. Nor is there a conflict between the various Courts of Appeal on the law as applied by the Court of Appeals in this case. In addition to this case, the Ninth Court of Appeals has an identical holding to the case at bar (without request for certiorari) in *Square D Co. v. National Labor Relations Board, supra.* In that case the rule was stated that when the existence of an unfair labor practice

is dependent upon the resolution of a preliminary dispute involving only the interpretation of a labor contract, then the Board is without jurisdiction. The Ninth Court of Appeals restated the rule as follows in *National Labor Relations Board v. Hyde*, 339 F. 2d 568 (1964) at page 572:

> "In general, the Board has no power to adjudicate contractual disputes. * * *"

The rule was stated by the Court of Appeals for the Fifth Circuit in *United Steelworkers v. American International Aluminum Corp.*, 334 F. 2d 147 (1964) at page 152 as follows:

> "* * * Indeed, so severely is the Board limited to the adjudication of statutory rights that it has no power to adjudicate contractual disputes. * * *"

That Circuit ruled likewise in *Sinclair Refining Co. v. National Labor Relations Board, supra*, at page 8 herein where that case is discussed in considerable detail.

The substance of the rule followed by the Court of Appeals in the matter at bar can also be found in practically all of the other Circuits. For example, *Independent Petroleum Workers v. Esso Standard Oil Company*, 235 F. 2d 401 (C. A. 3, 1956) wherein the Court said at page 405: "breach of contract is not an 'unfair labor practice.'" See also *Amalgamated Clothing Workers v. National Labor Relations Board*, 343 F. 2d 329 (C. A. D. C., 1965); *International Union, United Mine Workers v. National Labor Relations Board*, 257 F. 2d 211 (C. A. D. C., 1958); *United Electrical Radio and Machine Workers v. Worthington Corporation*, 236 F. 2d 364 (C. A. 1, 1956); *Textile Work-*

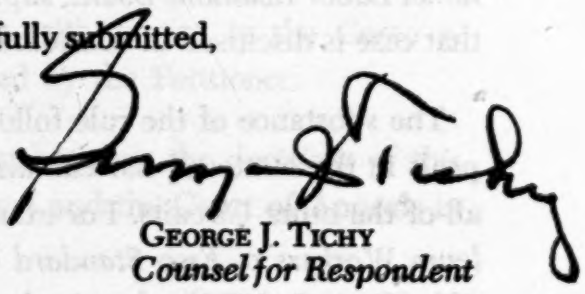
ers Union v. Arista Mills Co., 193 F. 2d 529 (C. A. 4, 1951); *International Association of Machinists v. Cameron Iron Works*, 257 F. 2d 467 (C. A. 5, 1958) cert. denied 358 U.S. 880 (1958); *Timken Roller Bearing Co. v. National Labor Relations Board*, 161 F. 2d 949 (C. A. 6, 1947) and *Timken Roller Bearing Co. v. National Labor Relations Board*, 325 F. 2d 746 (C. A. 6, 1963) cert. denied 376 U.S. 971 (1964).

4. Based upon the foregoing it is abundantly clear that the decision of the Court of Appeals is correct and in conformity with the law as interpreted and applied by this Court and the Courts of Appeal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a writ of certiorari in this matter should be denied.

Respectfully submitted,



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March, 1966

APPENDIX A

In addition to the relevant provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. 151, *et seq.*) set forth in Appendix C of the Petition, attention is also directed to the following:

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

* * * *

Sec. 8. (d) For the purposes of this section to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, that where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this sub-section shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

APPENDIX B

ARTICLE IV

SHOP COMMITTEE

A. The Union members in the employ of the Employer shall select a committee consisting of four (4) employees to be Shop Committeemen and Shop Stewards, with two (2) of these committeemen to be employees of C & C Plywood Corporation and two (2) of these committeemen to be employees of Veneers, Inc., and the committeemen to represent employees in the respective plant in which they work. To be eligible for membership on the Shop Committee a person must be a citizen of the United States, must be and remain employed by the Employer and must have been so employed for at least one (1) year immediately prior to his selection as a member of the Shop Committee. The Shop Committee shall represent the Union in all matters affecting the performance and administration of this Working Agreement, with the understanding that one (1) committeeman from each plant on the day shift and the swing shift for a total of four (4) committeemen, when the plant is operating a day and swing shift, shall be designated as Shop Stewards. The Union agrees to keep the Employer informed at all times as to the names and addresses of employees serving as Shop Committeemen and Stewards.

B. The Union agrees to also keep the Employer informed at all times as to the names and addresses of the President, Vice President, Recording Secretary and Business Representative of LSW Local No. 2405.

ARTICLE V

GRIEVANCES

A. Should there be any dispute or grievance arise under this Agreement, it shall be handled in the following manner:

(1) The employee or employees concerned shall continue to work, except in the case of suspension or discharge. The dispute or grievance shall first be taken up with the Plant Superintendent by the Shop Steward. If no settlement is reached within seventy-two (72) hours, the grievance shall then be taken to higher management of the Employer, by the Shop Steward and/or the Plant Superintendent for settlement, at which time the Union may call in its Business and/or Union Representative(s). If a satisfactory settlement is reached between the Shop Steward and Plant Superintendent or higher management, such settlement shall be binding on all parties concerned. Unless such grievance, dispute or complaint is presented to the Plant Superintendent within three (3) working days after it arises it shall be waived.

(2) Any issue, grievance or dispute arising under this Working Agreement which is not settled at the expiration of ninety (90) calendar days following the date upon which such issue, grievance or dispute arises shall be considered waived and nullified.

ARTICLE VI

STRIKES AND LOCKOUTS

A. During the life of this Agreement, no strike shall be authorized or caused by the Union or sanctioned by the employees of the Employer or members of the Union, and no lockout shall be ordered by the Employer until every peaceable method of settlement of the difficulties has been tried, including compliance with the provisions of Article V—Grievances and the Federal Mediation and Conciliation Service has been called in and has attempted to settle the dispute and failed to do so. No strike shall be called until approval is registered by secret ballot of a majority of the Union members then currently on the payroll, the Union has certified in writing the results of the balloting to the Employer, and the Employer has been notified in writing at least ten (10) days in advance of the effective date advising the date on which the strike is to start.

B. In the event that a work stoppage unauthorized by the Union occurs within the operations covered by this Agreement the employees responsible therefore may be discharged forthwith by the Employer without protest and/or recourse by the Union and the latter shall in no way be deemed responsible for such unauthorized stoppage. The Union agrees that it will not sanction or recognize "stranger" (not an employee) and/or jurisdictional pickets, and/or strikes affecting the Employer and/or employees of the Employer.

C. The parties recognize that in the event of any work stoppage it is essential for the interests of both parties that

damage and loss be minimized so that, at the conclusion of the stoppage, full employment and full production will not be delayed and therefore it is agreed that before and during such stoppage:

(1) Machinery, materials and equipment must be prepared for idleness, and products produced before the work stoppage must be protected against deterioration.

(2) Plant, machinery, materials, equipment and property must be adequately guarded and protected. The Union agrees not to interfere with the Employer's activities in carrying out these intents and purposes and agrees to allow sufficient employees selected by the Employer and/or such other personnel as selected by the Employer to carry out said intents and purposes.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 53

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

C & C PLYWOOD CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 105–112) is reported at 351 F.2d 224. The decision and order of the National Labor Relations Board (R. 95–103) are reported at 148 NLRB 414.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1965 (R. 112–113). On December 10, 1965, Mr. Justice Douglas extended the time for filing a petition for certiorari to and including January 8, 1966 (R. 114). The petition for a writ of certiorari was filed on January 7, 1966, and was granted on April 18, 1966 (R. 115; 384 U.S. 903). The juris-

diction of this Court rests upon 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act (29 U.S.C. 160(e)).

QUESTION PRESENTED

Whether the National Labor Relations Board was without jurisdiction to adjudicate an unfair labor practice controversy because its decision required the interpretation of a provision of the collective bargaining contract relied upon as a defense by the employer.

STATUTES INVOLVED

The relevant statutory provisions are set forth in the Appendix, *infra*, pp. 31–34.

STATEMENT

The Board certified the Union[1] as representative of the Company's production and maintenance employees in August, 1962 (R. 84). The parties subsequently entered into a collective bargaining agreement, effective May 1, 1963 (R. 61–72). Article XVII of the contract, captioned "Wages," provided (R. 67–68; emphasis added):

> A. A classified wage scale has been agreed upon by the Employer and the Union, and has been signed by the parties and thereby made a part of the written agreement. *The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like.* The payment of such a premium rate shall not be

[1] Plywood, Lumber and Saw Mill Workers, Local Union No. 2405, AFL–CIO.

> considered a permanent increase in the rate of that position and may, at sole option of the Employer, be reduced to the contractual rate at such time as the Employer feels that the employee no longer merits the premium, except that no present employee of the date of signing of this original Working Agreement shall suffer a wage reduction as a result of this Agreement.[2]

The contract also provided that all wage rates listed in the contract wage scale were closed "for the term of the * * * Agreement, subject to opening in the same manner as provided" in the contract termination provision (R. 71–72). The contract contained no provision for arbitration of disputes between the Company and the Union (R. 97, n. 4).

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[2] During an early bargaining session, the Company's negotiator, Thomason, mentioned that another lumber products company had proposed an "incentive" bonus system for its plywood department. The Union's negotiator declared that the Union would not agree to such a plan, and the matter was not pursued further during that meeting. (R. 86; 9, 10.) At a later meeting, the parties reached agreement with respect to the general "wage clause" of the contract and reduced it to written form, for incorporation into the contract when agreement was reached on the other terms (R. 86; 44). Thereafter, on March 12, 1963, the parties discussed the specific wage rates for the covered employees and a temporary deadlock occurred over the rates for the glue spreader crews (R. 86; 14). Following separate discussions by each side with a Federal Conciliator, the parties met again jointly and the Company, through Thomason, mentioned that it was "giving thought" to the possibility of promulgating a premium or incentive pay program for glue spreader crews. The Union negotiators did not make any reply to this comment. (R. 87–88, 98; 12–13, 14–15, 43–44, 53, 56.) The parties resolved the remaining differences at a bargaining session on April 10, and signed the final agreement on May 1, 1963 (R. 88, 96).

The Company employs approximately 30 men as members of several "glue spreader" crews.[4] Each crew is normally composed of one "core feeder," two "core layers," and one "sheet turner." The hourly rates of these jobs, as set out in the contract wage scale, are: sheet turner, $2.15; core feeder, $2.24; core layer, $2.29 (R. 96, n. 1; 71).

On May 20, 1963, less than one month after the collective bargaining agreement was concluded, the Company posted a notice that a "premium pay schedule" would "be tried for the next couple of months to determine how it will work for all concerned." Under the new schedule all members of a glue spreader crew were to receive increased pay at the rate of $2.50 per hour whenever the crew as a whole met certain production standards within a two week (later changed to one week) period (R. 88–89; 73). The Company placed this pay schedule in effect without prior notice to, or bargaining with, the Union; the Union learned about the plan from one of its members about a week after the plan was instituted (R. 89; 9).

By letter dated May 27, 1963, the Union asked the Company for a conference to discuss the "premium pay schedule" notice. The letter stated (R. 74–75):

> We do not consider this to be premium pay within the meaning of Article XVII, but rather a change in wages made dependent upon a production basis rather than hourly rates agreed upon by the Union. As a matter of fact

[4] The total number of employees of the Company represented by the Union is between 181 and 201 (R. 86–87; 16).

while we are perfectly willing to discuss increasing the hourly rates, or to the putting into effect premium hourly rates, we do not consider the subject of production bonuses, or wage rates based upon production standards, to be properly open for negotiation at this time.

The parties met on June 7 and 13, 1963. The Union requested rescission of the pay plan, but the Company refused, although it offered to discuss the terms of the plan (R. 90, 96; 10–11, 13, 18–19, 45, 77–79). The Union thereupon filed unfair labor practice charges with the Board, alleging that the Company had violated its bargaining obligation by unilaterally instituting the plan, and a complaint was issued (R. 1–4).

The Board rejected the Company's contention that it lacked jurisdiction to adjudicate the unfair labor practice question by virtue of the fact that a question of contract interpretation was involved in evaluating the Company's defense that its unilateral action was authorized by the "premium pay" provision of the contract. After consideration of the history of the contract negotiations and the terms of the contract provision viewed in light of the ordinary statutory right to bargain over wages, the Board found that the premium pay clause had been designed to authorize individual merit increases and had not been intended to give the Company the right unilaterally to raise the wages of entire crews on the condition that they meet certain production standards. The opposite result, the Board found, would be "so contrary to labor relations experience that it should not be inferred unless the lan-

guage of the contract or the history of negotiations clearly demonstrates this to be a fact." [4] Accordingly, the Board concluded that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing wages without prior bargaining. (R. 95–100.) The Board ordered the Company to cease and desist from the unfair labor practice found, to bargain with the Union upon request with respect to the institution of a premium pay plan for the glue spreader crews, and, if requested by the Union, to rescind any plan unilaterally instituted (R. 100–101).[5]

The court of appeals denied enforcement of the Board's order. The court held that, since "the ex-

[4] The Board concluded that the normal meaning of the contract clause was that the Company had "the right to make individual merit increases for special competence or skill." The Company's construction of the clause, on the other hand, would permit it "to select a group of employees and unilaterally change the method of compensating them from a straight hourly basis, with a fixed rate for each job category, to what is in effect a production basis, by raising the hourly contract wage rate contingent upon increased productivity." This construction "would be tantamount to saying that the Union inferentially surrendered to [the Company] the right unilaterally to establish production standards and wage rates based thereon as a method for compensating employees. Such an intent is so contrary to labor relations experience that it should not be inferred unless the language of the contract or the history of negotiations clearly demonstrates this to be a fact." (R. 99.) The Board concluded that the mere fact that the Company's negotiator, in the contract negotiations, had mentioned that the Company was "giving thought" to the possibility of promulgating a premium pay or incentive wage program for glue spreader crews" (see n. 2, *supra*) was not sufficient to constitute a waiver of the Union's statutory right to bargain over such a plan (R. 98).

[5] Member Leedom dissented from the Board's decision (R. 102).

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istence or non-existence of an unfair labor practice does not turn entirely upon the provisions of the Act, but arguably upon a good-faith dispute as to the correct meaning of the provisions of the collective-bargaining agreement," the Board could not proceed because this dispute was "beyond the subject-matter jurisdiction of the Board"; rather, it was "a matter for arbitration where * * * the collective-bargaining agreement so provides, or for adjudication by the Courts," where, as here, there was no arbitration provision (R. 105–112). The court concluded that the Board could not act until the contract defense relied upon by the Company had been tested in a separate judicial proceeding (R. 112).

ARGUMENT

INTRODUCTION AND SUMMARY

The Company in this case unilaterally instituted a wage plan whereby the members of its "glue spreader" crews would receive increased pay—above the hourly rates specified in the collective bargaining agreement—whenever the crew to which they belonged met certain production standards. The Union charged that this unilateral action was an unfair labor practice in violation of the duty to bargain collectively imposed by Section 8(a)(5) of the National Labor Relations Act. It is clear that, absent any valid defense, the Company's unilateral action would, in fact, violate Section 8(a)(5). See, *e.g.*, *National Labor Relations Board* v. *Katz*, 369 U.S. 736.

As a defense, the Company relied upon its contract with the Union, one provision of which reserved to

the Company the right to pay "a premium rate * * * to reward any particular employee for some special fitness, skill, aptitude or the like * * *". The Company urged that its wage plan was authorized by this provision and that the Union had therefore bargained away or waived its ordinary statutory right to be consulted about the institution of the wage increase. The Union, on the other hand, argued that the Company's plan was not a particular reward under the "premium rate" clause but a general change in the wage scale as to which the Union had not intended to relinquish its right to bargain.

The Board sought to adjudicate the contract dispute between the parties in order to determine whether the contract did, in fact, constitute a defense to the unfair labor practice charge. It construed the disputed provision in the light of its terms, the history of the contract negotiations, and the principle that an intention on the part of the Union to waive the fundamental right to bargain over generally applicable wage rates "is so contrary to labor relations experience that it should not be inferred unless the language of the contract or the history of negotiations clearly demonstrates this to be a fact" (R. 99, see n. 4, *supra*, p. 6). It concluded that the contract had, in fact, only been meant to authorize individual merit increases. Accordingly, the Board held that the Company's unilateral action with respect to wage rates violated Section 8(a)(5) of the Act.

In our view, the Board thus properly exercised jurisdiction to determine the existence of an unfair

labor practice in this case despite the existence of contract questions relevant to the Company's defense.* While the Board, we recognize, has no power to interpret or enforce collective bargaining agreements as such, we think it evident that the Board's jurisdiction to adjudicate affirmative statutory unfair labor practice charges is not precluded—as the court of appeals held—merely because a contractual defense to the statutory charge is interposed. It is clear that the Board has authority, in similar situations, to adjudicate unfair labor practice charges despite the existence of overlapping or threshold questions of contract interpretation. There is no reason why the same power should not be applicable to contract-defense situations. Board power in such cases not only rests affirmatively upon explicit language in Section 10(a) of the Act, but upon strong considerations making the Board, in many instances, the most appropriate

*The question in this case is, to some extent, related to the question presented in No. 52, O.T. 1966, *National Labor Relations Board* v. *Acme Industrial Co.* Like the issue here, the question in No. 52 concerns the power of the Board to resolve unfair labor practice disputes related to provisions of existing collective bargaining agreements. Unlike the collective bargaining agreement here, however, the agreement in No. 52 contained grievance and arbitration procedures for resolving differences in contract interpretation; the court of appeals in No. 52 held that the existence of these procedures precluded Board power. On the other hand, as we show in our brief in No. 52, the Board there was able to resolve the unfair labor practice controversy without, in fact, resolving any issue of contract interpretation, while such an issue was concededly relevant to the Board's determination here. While we urge in both cases that the Board's statutory power was not precluded, we agree that because of these differences, separate consideration of the issues in the two cases is appropriate.

forum for the adjudication of contract defenses. This, we think it clear, was such an appropriate situation. The contract between the parties contained no arbitration provision—hence no possible conflict with an arbitral solution of the contract dispute was present. Neither had a judicial interpretation been obtained, and no judicial proceeding was pending. The issue of interpretation, on the other hand, was not a difficult one, considerable delay and expense might have inhered in obtaining a separate judicial interpretation of the validity of the Company's defense, and the merit of the defense directly involved statutory considerations more amenable to Board than to judicial resolution.

THE BOARD WAS NOT PRECLUDED FROM DETERMINING THE UNFAIR LABOR PRACTICE CHARGE MERELY BECAUSE SUCH DETERMINATION REQUIRED IT TO INTERPRET A PROVISION OF A COLLECTIVE BARGAINING AGREEMENT RELIED UPON AS A DEFENSE TO THE CHARGE.

We agree, as we have just noted, that the National Labor Relations Act does not empower the Board to interpret the provisions of collective bargaining agreements when those issues are unrelated to alleged statutory unfair labor practices or to the Board's other functions under Sections 9 and 10 of the Act; nor can the violation of a contract provision, as such, ordinarily be affirmatively urged as a statutory unfair labor practice within the Board's domain. See, *e.g.*, *United Mine Workers* v. *National Labor Relations Board*, 257 F. 2d 211 (C.A.D.C.); see also *National Labor Relations Board* v. *American National Ins. Co.*, 343 U.S. 395; Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 Col.

L. Rev. 52, 58, 72–74 (1957).[1] It is clear, however, that this case is not within that category of contract disputes unrelated to specific unfair labor practice allegations. Here the Union, on the contrary, charged that the Company had committed an unfair labor practice by unilaterally raising wage rates—a charge based entirely upon the provisions of the Act, not upon provisions of the contract. The rights asserted here are thus statutory ones—the contract being relevant only as a defense to the statutory charges.

There are several ways in which issues of contract interpretation can thus overlap or be relevant to statutory unfair labor practice charges within the Board's jurisdiction.

(1) A collective bargaining agreement may incorporate a restriction or requirement which is also part of a party's statutory obligation under the Act. For example, the contract may prohibit discrimination against union members—discrimination which is also an unfair labor practice under Section 8(a)(3) of the Act. In these circumstances it has been clear that the duplication of statutory requirements in the terms of the contract—so that the resolution of the unfair

[1] In 1947, Congress rejected a proposal which would have made breach of a collective bargaining agreement as such an unfair labor practice, and provided instead a judicial remedy under Section 301 of the Labor-Management Relations Act. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 41–42; 1 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948) 545–546. The House Conference Report states that "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to be usual processes of the law and not to the National Labor Relations Board," *id.* at 546; see also 93 Cong. Rec. 6443, 2 Leg. Hist. 1539.

labor practice dispute perforce resolves the same question which could arise under the contract—does not automatically or generally preclude the Board from providing an unfair labor practice remedy. Otherwise the recognition of statutory obligations in a labor contract would displace the Board's authority to enforce those obligations—an obviously undesirable result. In *Smith* v. *Evening News Ass'n*, 371 U.S. 195, and *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, the Court consequently held that the duplication of statutory requirements in the contract did not preclude Board jurisdiction but merely created two remedies for the same conduct—a Board remedy and a contract remedy—between which the allegedly aggrieved party might ordinarily choose.* In thus upholding the Board's power, the Court noted that, in appropriate circumstances, the Board might properly choose not to exercise its jurisdiction. Specifically, the Court recognized that, where the collective agreement contains an arbitration clause, the Board has ordinarily declined to exercise its jurisdiction in situations where that would permit a party to a prior arbitration proceeding to relitigate before the Board questions already determined by the arbitrator, provided that "the procedure [before the arbitrator] was a fair one and the results were not repugnant to the Act";

* In *Smith*, the contract incorporated the Section 8(a)(3) guarantee against discrimination, and in *Carey*, it incorporated the Section 9(a) guarantee that the representative selected by a majority of the employees in an appropriate unit shall be the exclusive representative of all the employees in that unit for purposes of collective bargaining.

the Court also noted that the Board may also defer decision because of the pendency of arbitration. See *Carey v. Westinghouse Electric Corp.*, *supra*, at 270–271. The Court, however, did not suggest that the Board might—and it certainly did not intimate that it must—decline jurisdiction merely because of the possibility of a co-existing arbitral or judicial remedy.[9]

[9] On the contrary, in *Smith*, the Court specifically stated (371 U.S. at 197): "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301." And, in *Carey*, the Court noted (375 U.S. at 268): "[A] suit either in the federal courts, as provided by § 301(a) * * * or before such state tribunals as are authorized to act * * * is proper, even though an alternative remedy before the Board is available, which, if invoked by the employer, will protect him." The Court added (*id.*, at 272): "The superior authority of the Board may be invoked at any time." See also *National Labor Relations Board* v. *Walt Disney Productions*, 146 F. 2d 44, 47–49 (C.A. 9), certiorari denied, 324 U.S. 877; *Lodge 743, Machinists* v. *United Aircraft Corp.*, 337 F. 2d 3 (C.A. 2), certiorari denied, 380 U.S. 908.

This recognition of concurrent Board and contract remedies is consistent with the legislative history, which shows that, at the same time it enacted Section 301 of the Labor-Management Relations Act in 1947, 29 U.S.C. 185, which created a federal judicial remedy for contract violations, Congress continued to provide in Section 10(a) of the NLRA that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." The House Conference Report accompanying the 1947 Act states: "By retaining the language which provides the Board's powers under section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 52; 1 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O. 1948) 556.

(2) In the situation just described, while the Board's unfair labor practice decision necessarily decides a similar contract question, the Board need not separately determine the meaning of the contract; its decision may be based entirely—as the court of appeals here held that it must be—upon the meaning and application of the statute. In some instances, however, the Act makes it an unfair labor practice for provisions of certain types to be included in collective bargaining agreements; Section 8(a)(3), for example, prohibits certain union security provisions, and Section 8(e) bars so-called "hot cargo" agreements. Where contracts are challenged as being violative of these restrictions, the Board's power to interpret the challenged provision in order to test it by the statutory standard has also been clearly recognized.[10] As the court stated in *Red Star Express Lines* v. *National Labor Relations Board*, 196 F. 2d 78, 81 (C.A. 2): "In our opinion the Board was entitled to adopt this view [of the meaning of a contract clause] as a matter of sound policy and reasonable interpretation." It has never been suggested, to our knowledge, that the

[10] As to Section 8(a)(3), see *Red Star Express Lines* v. *National Labor Relations Board*, 196 F. 2d 78 (C.A. 2); *Great Lakes Carbon Corp.* v. *National Labor Relations Board*, 360 F. 2d 19 (C.A. 4); cf. *National Labor Relations Board* v. *News Syndicate Co.*, 365 U.S. 695. The Board makes a similar determination in deciding whether to treat a contract as a bar to a representation election under Section 9. See *Hager Hinge Mfg. Co.*, 80 NLRB 168. As to Section 8(e), see *Meat Drivers Local Union 710* v. *National Labor Relations Board*, 335 F. 2d 709 (C.A.D.C.); *Truck Drivers Union Local 413* v. *National Labor Relations Board*, 334 F. 2d 539 (C.A.D.C.), certiorari denied, 379 U.S. 916.

Board must decline jurisdiction in such cases where the interpretation of the challenged clause is in issue, and await an independent construction of the provision before enforcing the Act's requirements. Again, of course, the Board—while it ordinarily has the power to decide the unfair labor practice question when an issue of interpretation is present—may decline to exercise this power in appropriate circumstances; say, for example, when an arbitral interpretation, expressly agreed upon by the parties, has been finally rendered (or is pending), and its result does not offend fundamental statutory principles. (See *supra*, p. 12, and n. 13, *infra*, p. 18).

(3) The present case differs from that just described in that here a contract provision is asserted as a defense to—rather than as the affirmative basis of—an unfair labor practice charge. That is, here the Union asserted that the Company had violated its duty to bargain in good faith by unilaterally instituting changes in the wage structure immediately after a collective bargaining agreement incorporating wage scales had been entered into. Absent any relevant contract provision, the Company's conduct would be measured directly against its statutory bargaining obligation; the Board found that, so viewed, the Company's action had violated the Act. Here, however, the Company pointed to the "premium rate" provision of the contract as giving it the right to make the unilateral change which was challenged. If the wage change did, indeed, come within that provision, then the Company's act did not violate the statute, for a union may contractually waive its right

to be consulted as to certain matters in return for other contract guarantees. The meaning of the "premium rate" provision—that is, whether it amounted to a waiver of the Union's ordinary statutory right to bargain over a wage change such as the Company made here—was thus an issue in the unfair labor practice charge.

The Board believes that, as in the two other situations which we have described, it has jurisdiction in such a contract-defense case to determine the unfair labor practice charges. Indeed, the Board has consistently evaluated contract defenses in similar contexts and its power to do so has not been doubted."[11] For example, in *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 279–284, employees were discharged when they struck against the employer's unfair labor practices. In response to the union's unfair labor practice charge, the employer urged that the strike had violated a "no-strike" clause in the collective bargaining agreement (the discharge of employees who strike in violation of such a clause does not ordinarily constitute an unfair labor practice under the Act). The union, on the

[11] In 1947, by amending Section 8(a)(3) so as to ban the closed shop and permit the union shop and by requiring the Board to resolve jurisdictional disputes (Section 10(k)), Congress actually increased the instances in which the Board would be required to interpret contract provisions in connection with its unfair labor practice determinations. And, in 1959, Congress added Section 8(e), which further involved the Board in contract interpretation (see *supra*, p. 14).

other hand, urged that the "no-strike" clause did not prohibit strikes against employer unfair labor practices and, hence, that it had not been violated and the discharge of the strikers was unlawful. The Court recognized that the case turned "upon the proper interpretation of the particular contract before us." 350 U.S. at 279. The Board construed the "no-strike" clause in light of "the context of the contract and * * * the language of the clause itself" (*id.* at 283–284) and held that it did not prohibit strikes such as the one which had taken place. While the Court thus explicitly noted the Board's contract interpretation, it affirmed enforcement of the Board's order without suggesting that the Board's exercise of jurisdiction, where contract interpretation had been required, had been improper. See, also, *National Labor Relations Board* v. *Rockaway News Supply Co.*, 345 U.S. 71; *W. L. Mead, Inc.*, 113 NLRB 1040; *National Labor Relations Board* v. *Radio and Television Broadcast Engineers*, 364 U.S. 573, 577, n. 12; *National Association of Broadcast Engineers*, 105 NLRB 355."

[11] See also *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95. The issue there was whether the contract contained a no-strike clause, so that a strike called by the union was in breach of contract. The Court, while sustaining the jurisdiction of the state court to decide this issue under Section 301, recognized that this did not alter the Board's unfair labor practice power. "It is, of course, true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the N.L.R.B. to remedy unfair labor practices, as such." 369 U.S. at 101, n. 9.

We also believe that the instant case—where the contract contained no arbitration provision, where a judicial interpretation had not been obtained nor was a judicial proceeding pending, and where the issue of contract interpretation was not only within the Board's competence but closely entwined with evaluation of a relevent statutory provision—constituted a clearly appropriate exercise of this Board authority.[13]

[13] The Board ordinarily declines jurisdiction over questions of contract interpretation relevant to unfair labor practice charges when the contract contains an arbitration provision, when the parties have already obtained, or are in the process of obtaining, a decision thereunder, and when it is "reasonably probable that arbitration settlement of the contract dispute would also put at rest the unfair labor practice controversy in a manner sufficient to effectuate the policies of the Act." *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410, 1416. See this Court's decision in *Carey*, *supra*, p. 12; *International Harvester Co.*, 138 NLRB 923, 927, affirmed *sub nom. Ramsey* v. *National Labor Relations Board*, 327 F. 2d 784 (C.A. 7), certiorari denied, 377 U.S. 1003. See also *C & S Industries*, 158 NLRB No. 43; *Spielberg Mfg. Co.*, 112 NLRB 1080; *Dubo Mfg. Corp.*, 142 NLRB 431, 148 NLRB 1114; but cf. *Thor Power Tool Co.*, 148 NLRB 1379, 1381, affirmed, 351 F. 2d 584, 587 (C.A. 7). The Board likewise accords deference to an arbitrator's award in representation cases. See, *e.g.*, *Raley's Supermarkets*, 143 NLRB 256.

On the other hand, if there is no outstanding arbitration award or pending arbitration proceeding, or in the relatively rare case, like the present one, where the contract does not contain an arbitration procedure at all (see 1 CCH Labor Law Reporter, Union Contracts-Arbitration, par. 58,660, indicating that more than 90 percent of 1717 major collective bargaining agreements provided for arbitration at the terminal point), the Board will ordinarily not refrain from determining the contract issue insofar as it relates to the unfair labor practice charge if it concludes either that the issue is insubstantial, or that it involves a matter central to the system of collective bargaining established by the Act, thus requiring the applica-

A. The Board's jurisdiction in such circumstances is directly supported by Section 10(a) of the National Labor Relations Act (29 U.S.C. 160(a)), which provides that the Board's power to remedy unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." It is,

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tion of principles developed under the Act and not merely traditional principles of contract interpretation. See R. 97, n. 4; *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410; *Smith Cabinet Mfg. Co.*, 147 NLRB 1506; *Century Papers, Inc.*, 155 NLRB No. 40; *The Crescent Bed Co.*, 157 NLRB No. 22; *C & S Industries*, 158 NLRB No. 43. As we show in the text, the present case clearly fell within the latter category where the Board deems exercise of its jurisdiction to be appropriate.

Some of the earlier decisions of the Board reflect an even narrower view of the proper exercise of the Board's power in the presence of an arbitration agreement, *i.e.*, that the Board will refrain from deciding any question of contract interpretation that is capable of being resolved under the contract grievance and arbitration procedure. See *Consolidated Aircraft Corp.*, 47 NLRB 694, 705–706 (but note that the Board, although dismissing the refusal to bargain portions of the complaint, found that the employer's action violated Section 8(1) of the Act, *id.*, at 709; however, this finding was not fully sustained, 141 F. 2d 785 (C.A. 5)); *McDonnell Aircraft Corp.*, 109 NLRB 930, 934–935; *Crown Zellerbach Corp.*, 95 NLRB 753; *United Telephone Co. of the West*, 112 NLRB 779; *Morton Salt Co.*, 119 NLRB 1402; *National Dairy Products Corp.*, 126 NLRB 434. The Board's continued experience with the problem has led it to qualify and refine its earlier view. Cf. *Local 761, Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, 674 ("The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way * * * and has modified and reformed its standards on the basis of accumulating experience.").

we believe, impossible to read this provision consistently with the holding of the court of appeals that Board jurisdiction is excluded, in favor of a prior judicial decision on the relevant question of contract interpretation, whenever the determination whether an unfair labor practice exists "arguably" involves a construction of a provision or provisions of the collective bargaining agreement which are urged as a defense to the statutory charge (R. 111).

The court's holding means that the Board would, in all cases, have to delay enforcement of the statute until the relevant contract provision had been finally judicially determined—a process which might well take several years and would likely be much more expensive than a single Board proceeding. (See the court of appeals' decision at R. 112.) A prompt administrative determination and enforcement of the statutory requirements, however, is frequently essential to the safeguarding of statutory rights; a delayed enforcement of the statute may amount to no meaningful enforcement at all. We believe that it therefore would plainly "affect" the power of the Board to deal with unfair labor practices, within the meaning of Section 10(a), if an employer may always postpone the statutory Board proceeding in favor of a judicial determination regarding the meaning of the contract provisions merely by interposing such a provision as an "arguable" defense, regardless of its ultimate merits.

B. Nor are there any important countervailing policies which might be thought to overcome the appropriateness of Board power here despite the explicit statu-

tory recognition that Board jurisdiction is not to be displaced by co-existing remedies. In a case such as this one, where the parties have not entered into an arbitration agreement, the exercise of Board power cannot possibly come into collision with the policy favoring arbitral solutions of labor disputes recognized in this Court's *Steelworkers* decisions.[*] We also think it evident that, where no judicial interpretation of the relevant provision had ever been secured or sought, no national policy can be thought to favor state or federal judicial determinations over Board power exercised under Section 10, thus requiring the Board to abstain while a judicial proceeding is commenced. Indeed, as we now show, strong considerations of federal policy, in addition to the avoidance of delay, clearly make the Board the more appropriate primary forum in cases, like the present one, where the relevant contract provision is closely entwined with statutory requirements and policies and where the terms used in the contract may take on fuller meaning when viewed in the special context of collective bargaining relationships with which the Board is familiar.

As the present case shows, contract defenses to unfair labor practice charges frequently may not be judged merely as abstract questions of contract law, dissociated from statutory considerations; they must, instead, often be evaluated in light of applicable statutory considerations. Here, for example, the

[*] *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593.

question was the scope of the unilateral employer action with regard to wages permitted by the "premium rate" provision of the collective bargaining agreement. Absent any relevant contract provision, the employer's unilateral authority on this subject would be relatively narrow. See *National Labor Relations Board* v. *Katz*, 369 U.S. 736; *National Labor Relations Board* v. *Crompton-Highland Mills*, 337 U.S. 217. The question of "contract interpretation" in this case, then, was not a question of the meaning of contract terms, as such, but a dispute over whether, and to what extent, the Union had waived or bargained away its ordinary statutory right to bargain over wage changes.

The decision of such a question cannot properly be made without bringing to bear a full appreciation of the scope and tradition of the statutory right alleged to have been waived, matters as to which the Board has been entrusted with primary statutory responsibility. The agreement must be read "as a whole and in light of the law relating to it when made." *Mastro Plastics Corp., supra*, 350 U.S. at 279. In addition, the Board is likely to be especially sensitive to the significance, in a labor relations context, of terms such as "premium" pay as used in the agreement in this case. Cf. *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130; *National Labor Relations Board* v. *Coca-Cola Bottling Co.*, 350 U.S. 264, 269: "But if the word be deemed to have a peculiar connotation for those intimate with trade-union affairs, it is incumbent upon us to give the word its technical meaning * * *. If such be the

case, then of course the Board's expertness comes into play." The Board in this case found the Company's contention as to the meaning of the contract "contrary to labor relations experience" (R. 99). In these circumstances the Board concluded that the Company's interpretation should not be inferred unless the terms of the contract or the history of its negotiation clearly confirmed the alleged waiver of bargaining rights.[15] The Board's approach to such waiver contentions has been repeatedly affirmed as likely to lead to a correct decision regarding the intention of the parties.[16]

[15] See *Mastro Plastics Corp.*, *supra*, 350 U.S. at 283: "Whatever may be said of the legality of such a waiver [of the right to strike over an unfair labor practice] when explicitly stated, there is no adequate basis for implying its existence without a more compelling expression of it than appears in * * * this contract."

[16] The Board, with court approval, has held that a waiver of statutory rights must be clear and unmistakable, and that such waiver will not be found merely from the circumstance that the contract omits specific reference to a subject protected by the National Labor Relations Act, that it contains a general management prerogative clause, or that the union in the contract negotiations was unsuccessful in receiving contract protection for its statutory right. See the cases cited in our brief in *National Labor Relations Board* v. *Acme Industrial Co.*, No. 52, this Term, pp. 12–13, n. 9. See, in addition, *National Labor Relations Board* v. *Jacobs Mfg. Co.*, 196 F. 2d 680 (C.A. 2); *National Labor Relations Board* v. *J. H. Allison & Co.*, 165 F. 2d 766, 768 (C.A. 6), certiorari denied, 335 U.S. 814; *Proctor Mfg. Co.*, 131 NLRB 1166; *New York Mirror*, 151 NLRB 834, 839–841. And note *Electrical Workers* v. *General Electric Co.*, 332 F. 2d 485, 489, n. 3 (C.A. 2), certiorari denied, 379 U.S. 928. The Board has recently applied these principles, for example, to determine that a union had not waived its right to bargain about subcontracting, where the contract was silent on that subject, where it contained a general management prerogatives

If the Board, on the other hand, were not permitted thus to bring its cumulative expertise in the meaning of labor agreements *vis-a-vis* statutory rights to the resolution of such waiver questions, the result might well be an indirect dilution of the statutory guarantees through judicial decisions which, by virtue of unfamiliarity with the special context of labor contracts, might too readily assume that important safeguards have been abandoned. At the same time, a question regarding an asserted waiver of statutory rights such as that in this case involves few, if any, techniques or traditions of standard contract law with regard to which the Board might be deemed to lack competence as compared with a state or federal court. It would, indeed, have strained the normal meaning of language to construe a clause, which permits the payment of "a premium rate * * * to reward any particular employee for some special fitness, skill, aptitude or the like," as authorizing an employer to make a broad revision in the system for computing wages—converting it from a straight hourly basis with a fixed rate for each job category to an incentive pay system, with employees being paid a uniform rate based not on individual, but on group performance.[17]

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clause, and where the union had sought during the contract negotiations to obtain a ban upon subcontracting, but had failed. See *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410.

[17] The contract specified the following wage rates per hour: core layer, $2.29; core feeder, $2.24; sheet turner, $2.15 (R. 71). Under the Company's incentive pay plan, if the glue spreader crew exceeded its quota, all members of the crew, irrespective of their individual performance, were paid the uniform rate of $2.50 per hour. This erased the differential which the contract

C. A final consideration relevant to the decisional process also supports the Board's power here. If contract-defense questions were required in all cases to be decided judicially, rather than by the Board, their decision would often take place in a substantially abstract context. The union's affirmative claim or cause of action in such cases is statutory—here, for example, that the Company failed to bargain in good faith as required by Section 8(a)(5). Unless there is a contract provision embodying the same requirements, the union cannot present any affirmative claim in court, but must attempt merely to obtain a declaratory judgment regarding the meaning of the contract clause urged by the employer as a defense to the Board proceeding. Assuming that such declaratory relief is available,[18] the existence of the asserted defense to the union's statutory claim would be decided wholly outside the context of the statutory right to which that defense pertains, thus increasing the likelihood that the relevant statutory considerations will not be

had provided in the rates of the various members of the crew. (R. 39, 17, 42.) The contract also contained a so-called "zipper clause" (Art. XIX, R. 68–69), which recites that each party "had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter of collective bargaining," and that therefore "for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement." *See New York Mirror*, n. 16, *supra*.

[18] Many states may not have declaratory judgment procedures which would encompass such a request for an interpretation

developed. Moreover, even if the Union can point to a contract provision as the basis for other than declaratory judicial relief (in this case, for example, such a contract contention might be based on Article I of the contract, R. 61, requiring the Company "to deal with and recognize the Union as the sole bargaining agency with respect to wages, hours, and other terms and conditions of employment * * *"), it is by no means clear that a state or federal court would treat such a provision as the equivalent of the full statutory right to good-faith bargaining. Again, therefore, the contract defense might not be seen in its proper perspective as an asserted waiver of statutory rights."

In sum, we believe that the Board was not automatically precluded from deciding this case by the mere assertion of a contract defense and that strong considerations, in fact, supported the exercise of Board power. For the Board to have refrained from exercising its jurisdiction here would have necessitated a substantial delay in the effectuation of the statute—

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as a predicate for an unfair labor practice charge, and Section 301 of the Labor Management Relations Act (29 U.S.C. 185), under which federal judicial power would be based, is restricted on its face to authorizing "[s]uits for violation of contracts," not suits to determine the scope of potential contract defenses to unfair labor practice charges.

" Should relief be available to a union under such a contract provision when a statutory requirement is also violated, it is clear, as we show *supra*, pp. 12–13, in discussing this Court's decisions in *Smith* v. *Evening News Ass'n*, 371 U.S. 195 and *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, that the union would not thereby be required to avail itself of the contract remedy rather than the Board's jurisdiction. See also *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95 (n. 12, *supra*, p. 17).

perhaps as long as several years—while a final judicial determination was obtained. The contract issue presented was in no respect beyond the Board's competence and, indeed, the Company's contention that the Union had waived its statutory bargaining rights through the "premium pay" provision directly concerned considerations of labor relations experience in the context of the Act—including application of the salutary principle that waivers of statutory rights will not lightly be assumed—as to which the Board was the most appropriate forum. Nor, finally, did the Board here attempt to re-examine any decision of the question which had previously been reached between the parties or to perform any function which might in any event have been left to private arbitration.[20]

[20] Since the contract in this case contained no arbitration provision, the question need not be reached of the effect of such a clause—providing for arbitral settlement of disputes over the meaning or application of the contract—upon the Board's jurisdiction to interpret contract provisions invoked as defenses to unfair labor practice charges. As noted n. 13, *supra*, p. 18, the Board itself ordinarily declines to exercise jurisdiction to re-interpret provisions which have once been subject to arbitration and it also ordinarily declines jurisdiction where arbitration of the relevant provision is pending. The Board, however, does not feel similarly bound to defer in all cases to the mere presence of an arbitration clause, when that clause has not been invoked by either party to resolve the pertinent question of interpretation.

The Board recognizes, in this connection, that, by entering into an arbitration agreement, the parties have thereby agreed to utilize private machinery to determine questions of contract interpretation, and that it would often further the policy favoring the private resolution of disputes to honor that agreement. See Cox and Dunlop, *The Duty to Bargain Collectively During the*

Term of an Existing Agreement, 63 Harv. L. Rev. 1097, 1101–1102 (1950). However, the Board believes that there are at least two situations where the policies of the NLRA would not be effectuated by construing a contract grievance and arbitration procedure as automatically precluding it from interpreting a contract provision which is raised as a defense to an unfair labor practice charge. Where it appears that the contract issue is clearly insubstantial, to remit the case to the arbitrator would only invite respondents in unfair labor practice proceedings to raise frivolous contract defenses in order to delay Board jurisdiction. And, even where the contract question is substantial, the Board believes that a distinction may properly be drawn between a question which is not basic to the Act's regulatory scheme and turns essentially on principles of contract interpretation, and one which is central to that scheme and involves the application of statutory principles.

Thus, when an employer, such as the Company in this case, claims that his unilateral action is privileged under the contract, the evaluation of this claim usually requires more than the interpretation of a specific contract provision. The employer claim is ordinarily based, at least in part, on such general circumstances as a management prerogative clause, the fact that the contract does not specifically prohibit the action taken, or the union's failure to gain a specific prohibition during contract negotiations. The Board, under the NLRA, has developed principles for evaluating these general circumstances, which either may be ignored or misapplied by an arbitrator. For example, as shown, n. 16, *supra*, p. 23, the Board has held that a waiver of statutory rights must be clear and unmistakable and has formulated certain principles for determining when a waiver will be found. An arbitrator, on the other hand, who is ordinarily merely concerned with whether there has been a breach of the agreement, might never consider these principles, and, if he did, he might well apply them differently than would the Board. Many arbitrators, for example, apply the so-called "residual rights" theory when management takes unilateral action, holding that it is free to act unless the collective agreement expressly provides otherwise. See Elkouri, *How Arbitration Works*, 287–288 (BNA, 1960); *C. Pinkerton, Inc.*, 44 LA 1109; *Bethlehem Steel Co.*, 30 LA 675, 682, note and cases cited there; *Celanese Corp. of America*, 33 LA 925, 942,

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed, and the case should

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943–944; *Mead Corp.*, 46 LA 459, 468. Such a doctrine, which bestows upon management all "residual rights," stands on its head the established rule that a statutory waiver must be express and clear; it flows from an approach wholly inconsistent with decisions such as that of this Court in *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, holding that the NLRA, in certain circumstances, imposes a duty to bargain about subcontracting apart from any requirement in the collective agreement itself.

In short, where "contract" questions are central to the statutory scheme and involve application of statutory principles—as they do, for example, in this case—reference to an arbitrator may well lead to a result in conflict with the policies of the Act. The Board believes, in such situations, that it may decide the contract question itself when it finds that, for these reasons, it does not come "to us in a context that makes it reasonably probable that arbitration settlement of the contract dispute would also put at rest the unfair labor practice controversy" (*Cloverleaf Division*, *supra*, at 1416). See Lesnick, *Arbitration As a Limit on The Discretion of Management, Union, and NLRB: The Year's Major Developments*, Proceedings of New York University, 18th Annual Conference on Labor, 7, 24–25 (1966).

be remanded to that court with instructions to enforce the Board's order.

Respectfully submitted.

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SEPTEMBER 1966.

APPENDIX

The relevant provisions of the National Labor Relations Act (49 Stat. 449), as amended (29 U.S.C. 151, *et seq.*), are as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at

reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without

resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

* * *

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. * * *

* * * * *

SEC. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * * *

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed

in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise:

* * * * * * *

The relevant provisions of the Labor-Management Relations Act (61 Stat. 136, 29 U.S.C. 141, *et. seq.*) are as follows:

SEC. 203. (d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

* * * * * * *

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * * * * * *

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No. 53

In the Supreme Court of the United States

OCTOBER TERM, 1966

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

C & C PLYWOOD CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 53

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

C & C PLYWOOD CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT, C & C PLYWOOD CORPORATION

The Respondent, C & C Plywood Corporation, herewith respectfully submits its Brief on the Merits in this matter.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (R. 105-112) is officially reported at 351 F. 2d 224. The decision and order of the National Labor Relations Board (R. 95-103) is reported at 148 NLRB 414. The decision of the Trial Examiner is set forth in the Transcript of Record at pp. 81-94.

JURISDICTION

This matter arises out of an allegation of unfair labor practices made to the National Labor Relations Board

which is wholly and entirely dependent upon placing an interpretation on a provision of an existing, valid and binding collective bargaining agreement. The Board placed a strained interpretation upon the contractual provision, asserting that it did not afford a basis for the action taken by the Respondent Employer and that the Board therefor had jurisdiction. The Court of Appeals herein held "that the Board has no jurisdiction to adjudge an unfair labor practice where 'the existence of an unfair labor practice . . . is *dependent* upon the resolution of a preliminary dispute involving *only* the interpretation of the contract.'" (351 F. 2d 224, 227) Of course, this Court has jurisdiction over the National Labor Relations Board under section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 160(e) and over the Courts of Appeal both under the foregoing Act and under its general supervision of the Courts of Appeal. (62 Stat. 928, 28 U.S.C. 1254)

QUESTION PRESENTED

Does the National Labor Relations Board have jurisdiction to adjudicate an unfair labor practice when its only basis for doing so is to interpret and construe a collective bargaining agreement between the parties which agreement (neither contrary to public policy or the National Labor Relations Act, as amended) reasonably and arguably authorizes and permits the conduct deemed violative of the Act by the Board?

STATUTES INVOLVED

The Brief of the National Labor Relations Board incorporates within its Appendix (at pages 31-34) Sections

7, 8(a) (1) and (5), 8(d), 9(a) and 10(a) of the National Labor Relations Act. (49 Stat. 499), as amended (61 Stat. 136, 73 Stat. 519; 29 U.S.C. 151 *et seq.*), and Sections 203(d) and 301(a) of the Labor-Management Relations Act (61 Stat. 136, 29 U.S.C. 141, *et seq.*) In addition to those statutory provisions excerpts from Section 10(b), (c) and (e) of the National Labor Relations Act, as amended, *supra*, and Section 201(a), (b) and (c), 203(c) and Section 204(a) of the Labor-Management Relations Act, *supra*, are also deemed relevant and the specific terms of these provisions are incorporated in the Appendix, *infra*, pp. 79.

STATEMENT OF THE CASE

I. INTRODUCTION.

The C & C Plywood Corporation, the Respondent herein, is a manufacturer of plywood located near Kalispell, Montana. Its production and maintenance employees, together with those of another employer deemed to be a joint employer by the Labor Board, were, at all times pertinent to these proceedings, represented by Plywood, Lumber & Sawmill Workers Local Union No. 2405 hereinafter called the "Union." The collective bargaining unit during the period involved in this matter included from 181 to 201 employees. (R. 16)

The pertinent portions of the Complaint filed by the Labor Board against the Respondent are:

> "8. Since on or about May 20, 1963, without consulting the Union, Respondent unilaterally, and over the objection of said Union, instituted a group wage incentive plan covering approximately one-fourth of the employees in the appropriate unit.

"9. Since on or about May 20, 1963, and at all times thereafter, Respondent has refused upon demand made by the Union, and continues to refuse to bargain collectively with the Union over the group wage incentive plan." (R. 2)

The pertinent portions of the Answer filed by the Respondent are:

"On May 20, 1963, the Employer herein, pursuant to the provisions of the collective bargaining agreement, executed under date of May 1, 1963, posted a notice a copy of which is attached hereto and marked as Employer's Exhibit No. 1 and made a part hereof as if fully set out hereat.[1] Thereafter, and on June 7, 1963, and July 15, 1963, the Employer met with representatives of the Union and fully discussed and negotiated with the Union herein involved in good faith regarding the notice hercin referred to and its contents. Except as herein stated, the Employer denies each, every and all of the allegations of paragraphs numbered 8., 9., 10., 11., and 12. of the Complaint." (R. 5)

II. COLLECTIVE BARGAINING CONSUMMATED IN AGREEMENT.

A. The Section upon which Respondent Relies.

The Respondent and the Union entered into a written collective bargaining agreement on May 1, 1963, which was the fruit of eleven negotiating sessions, the last two of which were held on March 12 and April 19, 1963. (R. 12, 14; G.C. Ex. 2, R. 61)[2] The section of the Working Agree-

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[1]A copy of the notice the Respondent posted which gives rise to this controversy is reprinted at R. 6, 73.

[2]General Counsel's Exhibits are cited "G. C. Ex." and Respondent Employer's Exhibits are cited "Empl. Ex." each followed by the number of the exhibit. Exhibits are found at R. 61-80.

ment dealing with the subject of wages and wage rates was agreed upon during a negotiation session prior to the March 12 meeting. (R. 43-44) It was referred to and considered by the parties at the March 12 meeting in a context important to a complete understanding of the chronology of events involved here. Since the clause was agreed upon previously there appeared no reason to the employer negotiating committee to discuss its future application at this meeting. The section agreed upon and subsequently included in the written contract is as follows:

> "A. A classified wage scale has been agreed upon by the Employer and Union, and has been signed by the parties and thereby made a part of the written agreement. *The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like.* The payment of such a premium rate shall not be considered a permanent increase in the rate of that position and may, at sole option of the Employer, be reduced to the contractual rate at such time as the Employer feels that the employee no longer merits the premium, except that no present employee on the date of signing of this original Working Agreement shall suffer a wage reduction as a result of this agreement." (Emphasis supplied; G.C. Ex. 2, Article XVII, R. 67-68)

B. Respondent Advises Union Premium Pay Plan Contemplated.

With the emphasized portion of the above quoted excerpt of the agreed upon wage clause in mind, particularly in view of the interpretation placed upon substantially identical language in other labor contracts in the area with unions sister to the one here involved (hereinafter developed at p. 7), the Respondent, through Mr. Thomason,

its General Manager, advised the Union's negotiators at the March 12 meeting that the Respondent was studying a premium or incentive pay plan with respect to those it employed on its glue spreader crews. (R. 43-44, 52-53) Mr. Dexter L. Bright, a staff representative of the Timber Products Manufacturers Association who assisted Mr. Thomason in negotiations, made extensive notes as the events occurred in the negotiating sessions. He verified, both through his personal recollection and by way of his notes taken simultaneously with the event, that Mr. Thomason advised the Union negotiating committee at the March 12 meeting that he contemplated establishing a premium or incentive pay plan to apply to the glue spreader crews under the provisions of the already agreed upon wage clause. (R. 52-57) The Union representatives present at negotiations recall that the Respondent did discuss its intention of putting a premium pay plan into effect with respect to the glue spreader crews. (R. 9, 12)

At the March 12 meeting negotiations had reached a point where but two issues remained to be resolved by the parties: (1) the request of the Union for a contractual provision that all employees would be required to become and remain members of the Union as a condition of continued employment (union shop or union security); and, (2) a pay schedule for the glue spreader crews. (R. 43-44, 49) All other matters which subsequently made up the Working Agreement signed on May 1, 1963, had been tentatively agreed upon prior to the March 12 meeting and were ultimately included in that Working Agreement.

Specifically, in recording the events as they occurred at the March 12 meeting, Mr. Bright wrote in his notes:

> "Company position unchanged. Company is working on an incentive plan for spreader crews under premium clause."

These notes were taken as the event occurred and were recorded at the time that the Union and Company negotiators were in joint session conducted under the chairmanship of a Federal Mediator. (R. 56)

C. Substantially Identical Provisions Found in Labor Contracts of Sister Unions in Immediate Area.

That portion of Section A of Article XVII of the Working Agreement, upon which the Respondent relies, is virtually identical to the provisions found in wage clauses of other labor contracts existing between sister Montana unions to the Union here involved and Montana timber manufacturers. Mr. Robert C. Weller is business agent and a negotiator for these sister unions as well as this Union. (R. 14-15) Mr. Weller represented the Union here involved in the negotiations with the Respondent. (R. 8-16) These basically identical provisions in other working agreements had been in effect long before the comparable agreement between this Employer and Union so that there was considerable experience as to interpretation placed upon this provision by sister unions and timber products employers. These "premium pay" provisions and the experience that had been developed under them was made known to Mr. Thomason, the Respondent's General Manager, by Mr. Bright who assisted him in these negotiations. (R. 46-47, 53-55, 58)

A plan very comparable to that effectuated by the Respondent was in existence for some time at the Mount Lolo Lumber Company in Missoula, Montana, under a very similar contract provision. About the only essential difference at Mount Lolo was that the provision did not permit the Company to reduce the premium pay for an individual once it was established. The provision in the Mount Lolo agreement follows:

> "Nothing in this agreement shall be construed as to prevent the Employer from voluntarily advancing any wage rate or scale; but the advance of any individual rate or scale to reward a particular employee for some special fitness, skill, aptitude, or the like, shall not be considered a permanent increase in the rate or scale of that position after it has been vacated by a particular individual to whom the increase was granted." (R. 57)

The plan existing under this provision at Mount Lolo was applied to crews of men occupied in working together as a team. There are as many as three such crews working under this arrangement at Mount Lolo at one time. Each crew consists of two men who are engaged in loading railroad cars with lumber products. (R. 58) The men never receive less than the hourly rate provided for in the collective bargaining agreement for their job classification. The Company did, however, institute a premium or incentive pay plan under the terms of the above-quoted agreement. Under this plan, each member of the loading crew receives a higher rate than provided for in the agreement when the car loading crew loads an average of over 40,000 board feet of lumber per day. Some crews make the premium while others do not. After the required footage is loaded within a workday, the premium is based on each

additional thousand board feet of lumber loaded in that day's time. (R. 53-55) The Union at Mount Lolo is Local Union No. 2685 of the Lumber and Sawmill Workers located in Missoula of which Mr. Weller is one of the Business Agents. (R. 15, 57)

Another firm and plan discussed by Mr. Bright with Mr. Thomason was the arrangement at the Stoltze Land and Lumber Company near Columbia Falls, Montana, just about ten miles from the Respondent's plant herein. There the contractual provision read as follows:

> "Nothing in this agreement shall be construed as to prevent the Employer from paying a premium rate in excess of the agreed upon minimum scale to reward special fitness, skill, aptitude or the like." (R. 59)

One of the premium pay arrangements in existence under this provision is a plan whereby the head sawyer receives an additional 25¢ per hour for each hour worked in a month in which he averages 80,000 board feet or more of production per workday. (R. 58)

D. The Grievance Procedure.

Included within the Working Agreement is a relatively comprehensive grievance procedure designed to resolve issues that arise between the parties under the Agreement. (G.C. Ex. 2, Working Agreement, Articles IV, V and VI, R. 63-66) In their collective bargaining the parties chose not to conclude the processing of grievances with compulsory arbitration.

III. THE INAUGURATION OF THE PREMIUM PAY PLAN.

The Working Agreement was signed by the Union and the Respondent on May 1, 1963. (G.C. Ex. 2, R. 61-70) Within that Agreement, as Section A of Article XVII, was included the provision upon which the Respondent rests its belief that it has properly interpreted and applied its contract with the Union and has neither breached the contract nor committed an unfair labor practice. The Respondent has acted reasonably, in complete good faith and with a total lack of anti-union animus.

Following the signing and ratification of the Working Agreement and in the normal course of events, the Respondent completed its studies aimed at developing a premium pay plan for the glue spreaders and on May 20, 1963, posted a notice on its bulletin boards entitled "Glue Spreader Crew Premium Pay." (R. 6, 73)

A careful analysis of the plan will illustrate that the members of the glue spreader crew can improve their pay rates, thus earning a premium over the contractually established minimum wage rate by producing in excess of a given norm. Once that norm has been exceeded, however, the single premium rate is attained and remains constant. The premium rate does not increase with any further increase in production. Under no circumstances does any employee receive less than the rate called for in the Working Agreement for his particular job. (R. 42-43)

The Respondent made no effort to hide this premium pay plan. It was posted on all bulletin boards and com-

municated to all affected employees. (R. 39-40) Respondent believed that it was embarking upon a course of conduct authorized and permitted by the Working Agreement.

Under date of May 27, 1963, the Union sent a letter to the Respondent requesting a meeting with the Respondent "for the purpose of discussing your notice of May 20, 1963, headed 'Glue Spreader Crew Premium Pay.'" (G.C. Ex. 4, R. 74) The Respondent promptly replied and proposed a meeting for June 7 which was held. At that meeting, at which other matters were discussed as well, the Union representatives demanded that the premium pay plan be rescinded. The Union representatives in the June 7 meeting insisted that the posted premium pay plan was not permissible under the terms of the contract. (R. 19) The Respondent's representatives explained that they believed that it had the right to establish and maintain this premium pay plan under the provisions of Article XVII of the Working Agreement and declined to discontinue the plan. (R. 44-45) A second meeting was requested by the Union to which the Respondent readily agreed. This meeting was held on July 15 and for all practical purposes was a repetition of the prior meeting in that the positions of the Respondent and the Union were restated. (R. 10-11, 13, 45) These were the only two meetings held in which the subject of the premium pay plan was discussed after its establishment and before these proceedings were initiated.

At no time, in either meeting, did the Union offer or request a discussion of the manner in which the plan operated nor did the Union seek to revise it. The Union posi-

tion was adamant, fixed and unequivocal that the plan be rescinded. The Company declined in each instance making it clear it was relying on paragraph A of Article XVII of the Working Agreement. The Union did not seek to bargain on the plan in any way. Nevertheless, the Respondent held itself in readiness to do so. (R. 11, 13, 19, 45, 48-49)

Experience under this premium pay plan with respect to all of the glue spreader crews both before and after the plan was inaugurated is tabulated in Employer's Exhibit No. 1. (R. 79-80) The Exhibit shows that the members of every crew have at least once, by application of special fitness, skill, aptitude and the like, qualified for the premium pay. Some crews have qualified many times. Inasmuch as newly hired men start on the swing shift, the members of those crews less frequently qualify for the premium pay. (R. 41)

The Respondent has made every effort to administer the premium pay plan reasonably, to insure, as nearly as possible, that outside factors would not impair the freedom of employees to exercise the special skills, fitnesses, aptitudes or the like essential to qualifying for the premium pay. No employees have been disciplined, discharged or reprimanded for failure to meet the standards set up in this premium pay arrangement. (R. 39-40) For example, members of the crew are not penalized for any failure to obtain materials because of a holdup in the usual flow of materials for which they are not responsible. The Respondent does not compute such lost time in determining the average footage required to obtain the premium pay. (R. 41-42; G.C. Ex. 3; R. 6, 73) The Respondent made it a point to divide

up the raw materials so that each group of men would have an equal opportunity to make the premium pay if they were otherwise capable and desirous of doing so. (R. 40-41)

IV. PREMIUM PAY PROVISION OF WORKING AGREEMENT CLEARLY APPLICABLE TO GLUE SPREADER CREWS.

A "special fitness, skill, aptitude or the like," as set forth in Section A. of Article XVII of the Working Agreement, is clearly necessary on the part of each of the individuals who makes up a glue spreader crew, if he is to qualify for the premium pay provided by the plan. To attain the prescribed norm a high degree of coordination among the members of the crew is essential and this can only be obtained when each member of the crew exhibits a "special fitness, skill, aptitude or the like." To comprehend this requires an understanding of the functions of the employees involved.

A glue spreader crew ordinarily consists of four employees. The first employee in the course of production is the Core Feeder. Core is customarily thin pieces of veneer four feet long of random widths which is laid with the grain at a right angle to the grain of the eight foot sheets of veneer. The core veneers come in loads to the Core Feeder. He quickly scans the pieces of core veneers on the load before him, and selects acceptable core from the load. He watches the Core Layer at every opportunity and at proper intervals, if he is exercising the fitness, skill, and aptitude necessary for a premium, he uses a specially recommended method to insert the core through a glue spreading machine which in turn mechanically spreads glue on the core. The

Core Layer works at a lower floor level behind the glue spreading machine. He quickly observes to be sure that the Sheet Turners have placed an eight foot long (by roughly four foot wide) sheet of veneer in the proper place so that he may lay the core as required. He receives the core as it is ejected out of the glue spreading machine. At this point the upper and lower surfaces of the core must be adequately spread with glue. He quickly inspects this, accepting or rejecting core for further use. He rapidly places the acceptable core veneers individually on the larger sheet of veneer in such a manner that: (1) no core is overlapped with another; (2) no excessive gaps or hollow places are created; (3) no extraneous matter has come between the core and the sheet below or above the core; (4) the core so covers the sheet below and above the core that the plywood ultimately manufactured may be trimmed and finished in such a manner that it is of adequate strength and surface with respect both to sheets and cores, to be a marketable product. Standing immediately behind and to the side of the Core Layer are two Sheet Turners.

The Sheet Turners select one or two sheets of the eight foot veneer and place them as tops and bottoms or as one of the center plies of the plywood. A single sheet of veneer is used as center ply and in this operation a single sheet is lifted into place by the sheet turners. The veneer forming the top of one panel of plywood is placed in position concurrently with the sheet of veneer forming the bottom ply of the next succeeding panel of plywood. These pieces of veneer do not adhere to each other because the glue is spread only on the cores. The adjacent dry surfaces thus separate one panel of plywood from its predecessor and

successor in the stack. Sheets of veneer must be evaluated quickly as to their quality as a face, bottom or center ply and accepted or discarded. The Sheet Turners jointly carry a single sheet or two sheets from loads adjacent to where the plywood is being built up. This requires carrying the sheet or sheets usually over the head of the Core Layer. Because veneer is very thin, a flexible but rupturable material, it must be handled with adeptness and care. Caution must be taken to prevent slivers, knots and other debris from the veneer from being interjected or permitted to remain between sheets or between sheets and core with resultant defective plywood panel or panels. It is not uncommon in this operation for one of the Sheet Turners and the Core Layer to trade jobs periodically during the day. Under these circumstances, sometimes the Sheet Turner who so rotates is also known as a Core Layer (rather than a Sheet Turner) and draws the Core Layer rate, absent qualifying for the premium pay. Under these circumstances the crew is then made up of a Core Feeder, two Core Layers, and one Sheet Turner.

Many of the elements of "special fitness, skill, aptitude or the like" involved in each of these specific jobs are obvious by the very functions and responsibilities of these interdependent jobs. However, the specific points at which the particular employee must evidence "some special fitness, skill, aptitude, or the like" may be summarized as follows:

For the Core Feeder:

— Requires extra coordination;

— Requires an aptitude for feeding core through the glue spreader machine with both hands, independent of each other;

— Requires a quick and thoroughly observant eye and other skills, fitnesses and aptitudes involved in grading the rough core before it is used or discarded;
— Requires constant watching of the Core Layer in a sense of extremely close coordination to work with him to feed through that portion of the glue spreader machine handiest to the Core Layer;
— To see end of panel being made up so as to feed only the proper amount of core;
— To see end of panel being made up so as to feed only the proper width of core;
— To see end of panel being made up so as to stop feeding core until back, face or center plies are placed on panel being made up;
— To feed core only as fast as the Core Layer can handle it;
— Requires putting only one piece of core through glue spreading machine at a time;
— Requires selecting proper core widths to make up a panel so that unnecessary waste is avoided or a shortage is not encountered;
— Requires constant watching of the top roll of the glue spreading machine for observance of proper glue texture, that it is spreading glue properly, that nothing is sticking to that roll or that the roll has not become damaged or ineffective which might impair its proper functioning, etc. (R. 27-31, 34)

For the Core Layer:

— Requires extra coordination;
— Requires laying core stock side by side rapidly;
— Requires that gaps or hollow places in laying core stock be avoided;
— Requires that laps in laying core stock be avoided;
— Requires quick grading of stock as received (if damaged in going through the rolls of the glue spreading machine or graded in error by the Core Feeder, core must not be used);
— Requires constant watching of lower roll of glue spreading machine for observance of proper glue

texture, to ascertain that it is spreading glue properly, to make sure that nothing is sticking to that roll or that the roll has not become damaged or ineffective which might impair the proper functioning, etc.;

— Requires watching the thickness of the veneer to insure uniformity;

— Requires that he check to be sure that glue is spread evenly and fully on both sides of every piece of core;

— Requires constant alertness that no foreign matter comes between plies of panels as these are made up;

— Requires agile movements of the body, as he must bend quickly out of the way as the two men acting as Sheet Turners place the backs, faces and center plies (4 foot by 8 foot sheets) of veneer on the batch being made up;

— Requires adept handling of core which is spread with glue on both sides and is quite slippery and difficult to catch, handle and lay in proper position. (R. 31-34, 49)

For the two acting as Sheet Turners:

— Requires that each Sheet Turner grade out the 4 foot by 8 foot sheets of veneer used as backs, faces or center plies. Requires watching for feathering, thickness, loose knots, slivers, etc.;

— Requires proper preparation and matching of sheets before placing them on batch being made up;

— Requires careful examination of every 4 foot by 8 foot sheet to be sure that there is at least one straight 8 foot edge and that it is placed properly against the back board upon which the plywood panels are being built up;

— Requires individual and joint physical coordination between themselves and the Core Layer;

— Requires that men work well together;

— Requires that men place veneer sheets on their proper side against the glue and away from the glue to obtain maximum values from each sheet of veneer;

— Requires that work be accomplished so that these

large and very thin sheets of veneer are not torn, ripped or broken;

— Requires that the number of panels of rough plywood made up be counted accurately for inventory and for placing of separator panels at predetermined places;

— Requires that batch tickets be made up accurately;

— Requires removal of loose knots, slivers or splinters that may accumulate between sheets of veneer;

— Requires that these men adeptly carry the 4 foot by 8 foot veneer panels over the head of the Core Layer without hitting him or damaging, ripping, tearing or harming the material and then placing it so that no damage comes to the materials and that no foreign matter is placed between the materials;

— Requires one Sheet Turner rotate with the Core Layer periodically so that one Sheet Turner must also be adept as a Core Layer. (R. 35-37, 49)

Almost every function enumerated must be performed quickly, agilely, and with a reasonable degree of expertise if an employee is to qualify for premium pay.

Attention is also directed to the contractual wage scale which shows two of these three jobs to be the highest paid among all production jobs. The third is scheduled at almost the next highest contract wage rate. (G.C. Ex. 2, R. 71)

Mr. Thomason, Respondent's General Manager, a man of fourteen years experience in the plywood industry, and one who has performed work personally on a glue spreader crew, is a fully qualified expert on this activity. He testified that the above enumerated special fitnesses, skills, aptitudes and the like are necessary for any employees in the glue spreader crew to qualify for the premium pay under the premium pay plan. (R. 24, 31, 34, 37)

V. THE TRIAL EXAMINER'S DECISION.

The Trial Examiner, after hearing and reviewing the proceedings conducted before him and considering the arguments made at the hearing and by briefs, found as his third Conclusion of Law as follows:

> "3. Respondent did not, through management's promulgation of a premium pay plan for glue spreader crew workers prior to consultation with Union representatives, or through its refusal to rescind the plan upon Union demand, refuse to bargain with the Charging Party, within the meaning of Section 8(a) (5) of the Act, as amended; nor has Respondent, thereby interfered with, restrained or coerced employees in their exercise of rights statutorily guaranteed, within the meaning of Section 8(a) (1) of the Act." (R. 94)

The Trial Examiner then went on to hold:

> "Upon these findings of fact and conclusions of law, and upon the entire record in the case, my recommendation is that the Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended, dismiss the present complaint in its entirety." (R. 94)

Significant findings of fact by the Trial Examiner include these:

> "Substantially, therefore, this case reflects a dispute with respect to the scope of Respondent's contractually-reserved right to pay a premium rate conditioned upon the firm's desire to reward particular workers possessed of certain qualifications. General Counsel's complaint charges no statutory violation severable from this dispute between Respondent and the Charging Party [the Union], derived entirely from their conflicting contract interpretations.
>
> "(Respondent is charged, merely, with unilaterally promulgating a group wage incentive plan, without prior consultation and despite Union objections. Re-

spondent contends, precisely, that management was free to take such concededly unilateral action without prior consultation, pursuant to its contractually-reserved right to pay premium rates for specifically designated purposes.)

"Certainly, these disparate contentions—with respect to the type of wage rate revision which the contract permitted—reveal that the general 'wage' provision in question cannot, really, be considered sufficiently clear, in this particular regard, to forestall disputes regarding its scope. Despite a contrary contention by General Counsel and the Charging Party's representative, no persuasive demonstration has been proffered that Respondent's management—when it promulgated the disputed premium pay plan for glue spreader crew members—was acting in bad faith." (R. 91-92)

"General Manager Thomason's decision—so far as the record shows—was consciously reached within the framework of his firm's contract, as he construed it, and did not reflect a deliberate attempt to modify or terminate it. See *United Telephone Company of the West*, 112 NLRB 779. The Board's decision in the cited case—with respect to circumstances substantially comparable—declared that:

"Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years, with the approval of the courts: '* * * it will not effectuate the statutory policy * * * for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act.' (Citing cases).

"In this connection, further see *Morton Salt Company*, 119 NLRB 1402, wherein the Board—albeit in a case which did not involve a refusal to bargain—reached a comparable conclusion. Without passing

upon Respondent's other contentions, I find these considerations dispositive of this case." (R. 92-93)

The foregoing disposed of paragraph 8 of the Complaint. Dealing with paragraph 9 of the Complaint, the Trial Examiner stated:

> "Within his complaint, General Counsel has charged Respondent with a further refusal, upon Union demand, to bargain collectively regarding the newly promulgated group wage incentive plan. With matters in their present posture, however, this contention cannot be sustained. Though Respondent's management, clearly refused to concede any lack of propriety or justification with respect to the firm's promulgation of the disputed premium pay plan, spokesmen for the Company made manifest, throughout, their readiness to negotiate regarding the specific terms and conditions under which premium pay would be awarded workers on glue spreader crews. Representatives of the Charging Party, however, made no effort to bargain regarding the plan's content. With matters in their present posture, therefore, Respondent cannot be found in default—upon this ground either—with respect to its statutory obligation to bargain." (R. 93)

VI. THE DECISION OF THE BOARD.

The Board reasoned that it has the right to interpret and construe collective bargaining agreements simply because it is necessary for it to do so in applying certain portions of the Act, namely for determining whether a contract is a bar to a representation matter, union security provisions, or Section 8(e) matters. It also observed that there was neither litigation before a court nor an arbitrator and that the labor agreement did not include a provision for arbitration. Thus having established, in its estimate, its right to construe the contract, and having found that neither the

events leading up to the agreement nor the provisions of it established a "waiver" on the part of the Union and having further found that the language of the contract was "so contrary to labor relations experience," the Board then concluded that the language involved was inapplicable to the premium pay plan established by the Respondent Employer. The Board thereupon ruled that the Respondent had engaged in unfair labor practices. (R. 95-101) One member of the Board dissented. He observed that this decision was decided by the wrong forum, and that it was a departure from valid precedent and from a long-standing and salutory rule of the Board. (R. 102)

VII. THE DECISION OF THE COURT OF APPEALS.

The Court of Appeals properly distinguishes this matter from prior decisions in which the Board was called upon to interpret a labor agreement in the following passages:

> "Where the disputed provisions of a collective-bargaining agreement do no more than affirmatively prohibit conduct already defined and forbidden by the Act as an unfair labor practice, the Board can never be ousted of jurisdiction, for the reason that the controversy would involve no more than a breach of these negative contract provisions—a violation of duty already 'imposed directly by the Act,' irrespective of the contract itself. Were it otherwise, it would be a simple matter to remove from the jurisdiction of the Board all unfair labor practice disputes, by the facile device of prohibiting in the collective-bargaining contract all unfair labor practices defined in the Act.
>
> "The disputed provisions of the collective-bargaining agreement at bar clearly present quite a different situation from that just discussed. Here, the parties

have arguably agreed affirmatively to permit conduct which, sans contract, the Act would admittedly condemn as an unfair labor practice. The resulting controversy then, as to whether the provisions of the contract positively sanction the action complained of, is a matter for arbitration where, as in *Square D.*,[3] the collective-bargaining agreement so provides, or for adjudication by the Courts; and hence is beyond the subject-matter jurisdiction of the Board. This is necessarily so because, under the circumstances at bar, the very existence of the alleged unfair labor practice is 'dependent upon the resolution of a preliminary dispute involving *only* the interpretation of the contract.' • • •" (*National Labor Relations Board v. C & C Plywood Corporation*, 351 F. 2d 224, 227; R. 110-111)

[3] *Square D Co. v. National Labor Relations Board*, 332 F. 2d 360 (C. A. 9, 1964)

ARGUMENT

I. SUMMARY OF RESPONDENT'S ARGUMENT

The Respondent Employer's argument has two separate facets: A. The National Labor Relations Board, herein called the Labor Board or the Board, is without authority to construe, interpret or administer labor agreements as a normal or usual practice and it may not find an unfair labor practice where the threshold question is dependent upon an interpretation of a contractual provision; and, B. If this Court should decide that the Board does have that authority, the interpretation here made was not valid or reasonable and such construction should be set aside.

A. The Board Lacks Authority to Interpret, Construe or Administer Labor Agreements.

The Labor Board does not have the right, as a normal and usual matter, to interpret, construe or administer collective bargaining agreements. Any rights that it has in this area are limited to those specifically given to it under the National Labor Relations Act, as amended, from which the Board derives all of its powers.

The Congress has made it clear, not only through its long and articulate legislative history but by the terms of the Act itself that collective bargaining of employers and representatives of employees is to be nurtured and encouraged, not frustrated. This is evidenced by the fact that the Senate would have (through the insertion of a proviso making the breach of a contract and other agreements an unfair labor practice[4]) given the Board broad authority

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[4]S. 1126 and H. R. 3020 as amended and passed by the Senate, 80th Cong., 1st Sess. Secs. 8(a) (6) and 8(b) (5).

to interpret, construe and administer labor contracts but in the last analysis withdrew this authority. This view is supported by the Congressional debates which indicate the great concern of the legislators not to overburden the Board or cause its caseload to become too great. Congress was satisfied that the parties to a dispute over an interpretation to a collective bargaining agreement had adequate and prompt remedies: (1) under the provisions of the newly adopted Section 301; (2) under the already established jurisdiction of State courts or other State bodies; (3) Federal and State facilities for mediation; (4) final and binding arbitration whether set forth in the agreement of the parties or accepted on an *ad hoc* basis; and, (5) collective bargaining as such.

Congress was straight-forward in its admonition that collective bargaining was the desired ultimate objective of this legislation and made it manifest that bargaining should be given free play. The Findings and Policies of the National Labor Relations Act as amended (Sec. 1), and particularly the limitations which Section 8(d) of that Act placed upon the scope of the Board's authority to find that a refusal-to-bargain-collectively constitutes an unfair labor practice, together with the establishment of an independent mediation agency in Title II of the Labor-Management Relations Act, 1947 support the thesis that the Board is not to have general, broad authority to interpret, construe or administer collective bargaining agreements. The Congress opposed compulsory arbitration of labor disputes and the Board's conduct in this matter is tantamount to compulsory arbitration.

The fact that the same question was not pending before a Court, an arbitrator or any other forum, did not, as the Board implies, give rise to authority within the Board to install itself in the gap which it imagines to exist. The Board's jurisdiction does not arise simply because it believes it administers speedy justice or because the contractual interpretation involved was a simple matter. While other forums may have concurrent jurisdiction over the same factual situation with the Board as indicated in Section 10(a) of the National Labor Relations Act, as amended, the converse does not follow. The Board is limited by statutory authority. The limitations placed upon other forums arise out of other and different considerations.

The Board's own precedents which go back well over twenty-five years do not support its decision in this matter. It is creating by its own current decisions a conflict in administration of the Act by not uniformly pursuing the same course in comparable factual situations. The law the Board administers has not changed, although the Board's personnel has. The Board's function is to administer the statute involved, not the labor agreement of the parties.

B. The Board's Contractual Interpretation is not Valid.

Should this Court find that the Board was within its authority to interpret the labor contract of the parties, that interpretation was unsound, improper and indefensible. The interpretation substitutes an "expertise" the Board does not have for any evidence or testimony which should be in the record. As a consequence, the Board's decision

cannot be sustained either under the provisions of the National Labor Relations Act, as amended, or under the decisions of this Court.[5]

The interpretation placed upon the language of the contract denies the common usage of the terms employed as evidenced by the dictionary meaning of the words involved as well as the use put to these words in other area and industry agreements involving sister unions to the one here involved.

The language of the contract interpreted is not ambiguous and applies to the purpose to which the Respondent Employer put it. The Employer was provided with a reserved right in the area of wage payment and standards.

The bargaining agency of the Union was in no manner defeated since the premium pay plan installed by the Respondent Employer did not in any manner cut the wages of the employees or thwart the agreement made by the Union. The employees involved were in no event to receive less than the hourly rate agreed upon and there was no compulsion placed upon the employees to meet the norm established nor were any employees reprimanded or penalized for failure to satisfy that norm.

In contract interpretation, language is not the sole consideration. Area and industry practices are to be considered. In this matter other timber products firms in the area and industry had comparable provisions which were

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[5] *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474 (1951) and Secs. 10(b), (c) and (e) of the National Labor Relations Act, as amended.

interpreted and applied to situations so nearly parallel to the one at hand that any reasonable person would believe the action taken by this Respondent Employer was covered by the language of this labor agreement.

In substituting its questioned "expertness" for the language of the agreement, the Board did not have any evidence or testimony that confirmed or corroborated its conclusion. Instead it appears to have relied upon what it deemed best for the Union without regard to its prior agreement and the conditions and practices in labor relations in the State of Montana, the Pacific Northwest or the timber products industry. It is to be noted that this area and industry does not subscribe to certain concepts of industrial relations sometimes found prevelant elsewhere in the nation, such as, for example, final and binding arbitration set down within the contract to be the final step in contract interpretation (as distinguished from *ad hoc* arbitration). Moreover, there is no concerted refusal in this region or industry to utilize premium pay and related incentives for the purpose of improving productivity and employee performance.

II. A CRITICAL ANALYSIS OF THE BOARD DECISION.

In its decision the Board set aside the agreement of the parties which had been made in the usual course of collective bargaining, stating in substance, that the agreement did not authorize or excuse an act which absent such agreement was *per se* an unfair labor practice. The Respondent Employer set up as its defense that the language of the agreement entered into authorized and permitted

the act forming the basis of the complaint.[6] Our national public policy and law encourages, not forbids, the parties to enter into an agreement "in respect to rates of pay, wages, hours of employment, or other conditions of employment."[7] Such agreements are not to be equated with ordinary contracts nor are such agreements to be interpreted in a highly restrictive manner.[8] The provision here involved was a reserved right, that is, the Respondent Employer sought to reserve unto itself those rights it would have had absent the statute, and the Union by its agreement concured. That is why it was written in the language:

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[6]The pertinent allegations of the Complaint are recited at pp. 3-4, *supra*. The Board found that the Respondent Employer had made two defenses, one alleging that by the conduct of the parties during negotiations the Union had waived its statutory rights and the second based upon the language of the contract in Article XVII. The Board has erred in this analysis. The Respondent Employer has relied exclusively upon the language of the labor agreement for its defense. While it does not believe that language to be ambiguous and in need of parole evidence to understand or interpret it, it did introduce testimony to show that the common usage of the language employed as evidenced by its dictionary meaning, as evidenced by the use put to substantially equivalent language in labor agreements between sister unions and neighboring employers and the fact that the Union was put on notice as to the intended purpose and use of the language, all supported the course of conduct undertaken by it. Further, the Respondent Employer pointed out that there was not one iota of evidence or testimony to indicate that the Respondent did not act in complete good faith and in the honest and reasonable belief that it could do that which it did.

[7]See Findings and Policies of National Labor Relations Act, as amended, Sec. 1, as well as Secs. 8(d) and 9(a) of that Act and Secs. 201 and 204(a) of the Labor Management Relations Act, 1947.

[8]*United Steelworkers v. Warrior & Gulf Navig. Co.*, 363 U. S. 574, 578-9 (1960) wherein Justice Douglas observed: "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract: it is a *generalized* code to govern a myriad of cases which the draftsman cannot wholly anticipate.*** The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law *of a particular industry* or of a particular plant." (Emphasis supplied.)

"The Employer reserves the right * * *."[9] Further, the language used by the parties, when taken either at face value or in light of common usage either delineated by area and industry practice or the common dictionary meaning, clearly supports the conduct of the Respondent Employer. Instead, however, the Board embarks upon a novel and jejune course disregarding the clear import of the language used, substituting its own unique interpretation.

The Board proceeded to do this by finding that it has the right and capacity to construe labor contracts citing as examples its involvement in determining whether a contract is a bar to a representation election, complies with union security limitations or violates Section 8(e). (R. 97) But, it does not observe that in each of those instances it has statutory standards upon which to base the construction of the agreement itself and that it is not there called upon to substitute its judgment for that of the parties or the express language of their agreement. The Board totally disregards the import of the language of the Act under which it exercises its jurisdiction as well as the legislative intent to keep the Board out of the area of interpreting, enforcing or administering collective bargaining agreements. The Board, instead, ventures into an area of self-expansion of its jurisdiction and usurpation of the collective bargaining function of the parties.

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[9]A reserved right in the same sense and within the sphere indicated by this Court in the *Warrior & Gulf, supra*, decision wherein the Court quoted with approval from Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1498-1499 (1959). The Employer reserved for itself, with Union approval, a broad area of prerogative within the sphere of compulsory bargaining regulating "rates of pay and wages."

The Board further supports its determination of authority to construe and interpret a labor contract because the identical question is not pending before a civil court or an arbitrator. (R. 97) That argument loses sight of the fact that Congress did not choose to establish compulsory arbitration as the last step to resolving differences between parties in the administration of their collective bargaining agreements and in no event was the Board given such authority.[10] Whether or not this matter was pending before a civil court or an arbitrator is immaterial. The Board's so-called rule of comity in such situations is limited to circumstances in which either the court or the arbitrator is occupied in resolving an issue over which the Board also has jurisdiction under Section 10(a) of the Act.[11] Here, the Board seeks to reverse that rule when it has no statutory basis upon which to do so. In the instant proceeding, the Board reasons that since the matter could have been submitted to a Court, or to an arbitrator, but was not, it (the Board) then acquired jurisdiction. There is nothing

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[10]It is clear that Congress did not intend to establish compulsory arbitration in any sense. See Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess. 13-14; 93 Cong. Record 5297 (May 13, 1947); 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, (U.S. Govt. Print. Off., 1948) 419-20; 2 Legis. Hist. Labor Mgmt. Relations Act, 1947, 1520.

[11]Section 10(a) provides that the Board's authority *to prevent unfair labor practices* "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." Thus, it has been held that the existence of an arbitration remedy under a contract cannot oust the Board of its jurisdiction to remedy an unfair labor practice. *National Labor Relations Board v. Wagner Iron Works*, 220 F. 2d 126 (CA 7, 1955), cert. denied 350 U. S. 981 (1956). The Board has adopted a rule of comity under which it will honor an arbitration award to which all parties agreed to be bound, the proceedings were "fair and regular" and the decision was not "clearly repugnant to the purposes of the Act." *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). See also *Raley's, Inc.*, 143 NLRB 256 (1963) and *Ramsey v. National Labor Relations Board*, 327 F. 2d 784 (CA 7, 1964)

in the statutory authority of the Board or in the deliberations of Congress which even remotely permits such a usurpation of authority by the Board.

Having crossed these tenuous gaps in its authority, the Board then deals with the two defenses it claims were raised by the Respondent Employer.[12] The first, it says, deals with the conduct of the parties in negotiations, finding that the conduct was not sufficiently precise when measured by its judgments to give rise to a "waiver" of a statutory right by the Union. The second, and actually the only defense raised by the Respondent Employer, was the specific language of the labor contract. The Respondent believes that in the absense of unquestioned ambiguity, the discussions of the parties normal to collective bargaining were merged into the agreement. Here the Board proceeds to ignore totally the fact that no employee will receive less than the contractually determined hourly rate of pay under any circumstances and that no employee is compelled at any time to meet the standards set by the premium pay plan either to retain his employee status or to receive the rate specified in the contract. Instead, the employees will receive a higher hourly rate of pay if they voluntarily attain a higher production standard. The Board ignores the common usage as evidenced by the dictionary meaning of the words involved. The Board even ignores one of its own unique reasonings applied in other cases contemporary to

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[12]See note 6, *supra*, p. 29.

this matter.[13] Instead, the Board appears to reach out in its "expertise" to substitute its own judgment in finding that "such an intent is so contrary to labor relations experience that it should not be inferred * * *."[14] (R. 99)

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[13]The Labor Board has developed a rather unique rationale in evaluating a refusal to bargain (Section 8(a) (5)) charge. It has held that in instances where an employer has subcontracted without notice to or consultation with the bargaining agent but "the subcontracting in question did not cause a *significant detriment* to the employees in the bargaining unit" such conduct was not violative of Section 8(a) (5) of the Act. *American Oil Co.*, 151 NLRB 421 (1965); *Kennecott Copper Corp.*, 148 NLRB 1653 (1964). The same reasoning is equally applicable to the matter at hand assuming *arguendo* that the Employer's conduct technically violated Section 8(a) (5) for there can be no showing that there has been a "significant detriment" to the employees in the bargaining unit.

[14]The House, in its deliberations which resulted in the present Labor Act, decried the alleged "expertness" of the Board. The House Conference Report observed: "As previously stated in the discussion of amendments to section 10(b) and section 10(c), by reason of the new language concerning the rules of evidence and the preponderance of the evidence, *presumed expertness on the part of the Board in its field can no longer be a factor in the Board's decisions.* * * *." The Report continues: "The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evidence on the record considered as a whole. The provisions of Section 10(b) of the conference agreement insure the Board's receiving only legal evidence, and Section 10(c) insures its deciding in accordance with the preponderance of the evidence. These two statutory requirements in and of themselves give rise to questions of law which the courts will hereafter be called upon to determine—whether the requirements have been met. This, in conjunction with the language of the Senate amendment with respect to the Board's findings of fact—language which the conference agreement adopts—will very materially broaden the scope of the courts' reviewing power. This is not to say that the courts will be required to decide any case de novo themselves weighing the evidence, but they will be under a duty to see that the Board observes the provisions of the earlier sections *that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record*, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. *The language also precludes the substitution of expertness for evidence in making decisions.* * * *" (Emphasis supplied) House Conference Report No. 510, 80th Cong., 1st Sess. 56, 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 560. Attention is directed to the parallel between that

(Continued on Page 34)

The Board is not filling a void in the law by its improper exercise of jurisdiction in a matter of this kind. Even prior to the current Labor Act, the Union would have had a remedy in State Law to obtain specific performance of the contract, sue for breach thereof, or obtain an injunction if the conduct of the Employer was causing irreparable harm or was not compensable with damages.[15] With the new Labor Act it also gained under Section 301 the right to obtain the review of the Federal Courts of its contractual dispute.[16] Nothing prevented the Union from proposing *ad hoc* arbitration and there is nothing in the record to indicate that the Employer would have opposed such a disposition of their argument. Of course, the Union also could have requested and obtained mediation.[17] Finally, the contract did not prevent either self-help or simply dropping the matter. Thus, the alternates to Board intervention were many. Several offered a conclusive and peaceful solution.

(Continued from Page 33)

which the Congress sought to thwart and that which the Board did here. In spite of the common usage of the terms involved as evidenced by their dictionary definitions, in spite of the area and industry practice and application given to comparable terms authenticating the Respondent Employer's application of the language involved and without any evidence or testimony to support its own view, the Board has, in fact, sought to substitute its questionable "Expertise" for the evidence and testimony in the record.

[15]*Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962); *Teamsters Local 174 v. Lucas Flour Co.*, 57 Wash. 2d 95, 356 P. 2d 1 (1960) affmd 369 U.S. 95 (1962); *McCarroll v. Los Angeles Council of Carpenters*, 49 Cal. 2d 45, 315 P. 2d 322 (1957); *General Electric Co. v. United Auto Workers*, 93 Ohio App. 139, 108 N.E. 2d 211 (1952); *Springer v. Powder Power Tool Corp.*, 220 Ore. 102, 348 P. 2d 1112 (1960).

[16]*Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); *Dowd Box Co. v. Courtney, supra.*

[17]See Article VI, Section A of the Labor Agreement. (R. 65) Also, Sec. 203(c) of the Labor Management Relations Act, 1947, 29 U.S.C. 173(c).

The decision of the Board in this matter is a departure from a long standing line of cases, which go back to 1936, which state that it either does not have the authority to interpret, construe or administer labor agreements or that it will not ordinarily exercise its jurisdiction in such conflicts.[18] The departure can be closely associated with the change in personnel of the Board, not with any change in the law.[19]

Finally, it is important to observe that there was utterly no evidence of anti-union animus or bad faith on the part of the Respondent Employer. While this Court has held that such is not necessary to a finding of a Section 8(a)(5) unfair labor practice, its absence conclusively demonstrates that the matter was one of pure argument over the

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[18] *Consumer's Research, Inc.*, 2 NLRB 57, 74 (1936) wherein the Board said: "The Board has no power under the Act to decide upon the subject matter or substantive terms of a union agreement." See also *Consolidated Aircraft Corp.*, 47 NLRB 694 (1943) in which the Board observed: "* * * it will not effectuate the statutory policy of 'encouraging the practice and procedure of collective bargaining' for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act. On the contrary, we believe that parties to collective contracts would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through settlement procedures mutually agreed upon by them, and to remit the interpretation and administration of their contracts to the Board. * * *" Affmd. *Consolidated Aircraft Corp. v. N.L.R.B.*, 144 F. 2d 785 (CA 9, 1944).

[19] The departure from past precedent appears to have been fashioned out of early dissents to the old rule written by recently appointed members of the Board. See *Hercules Motor Corp.*, 136 NLRB 1648 (1962) Cf. *Smith Cabinet Mfg. Co.*, 147 NLRB 1506 (1964).

application of a provision of the labor agreement.[20]

III. THE BOARD IS WITHOUT JURISDICTION TO ADMINISTER LABOR AGREEMENTS.

A. The Statutory Sanctions and Legislative History.

It is clear that Congress did not intend the National Labor Relations Board to be substituted for the Courts, voluntary arbitration or any other means that the parties voluntarily chose to resolve their differences once a collective bargaining agreement had been reached by the parties, as long as the conduct involved either in reaching the agreement or in meeting with regard to it thereafter was not a clear violation of Section 8 of the Act. This is evidenced by the language of the same Act which breathes life into the Board and determines its jurisdiction. This is buttressed by the legislative history of that Act, which conclusively shows a legislative intent not to empower the Board to function in the area of conflicts over interpretation of agreements or breaches of contracts. Specifically, reference is made to Sections 1, 8(a) and (d) and 9(a) and 10(a) of the National Labor Relations Act, as amended, (49 Stat. 449, 61 Stat, 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) as well as Sections 201 (a), (b) and (c), 203 (d) 204 (a) and 301 (a) of the Labor Management Relations Act (61 Stat. 136, 29 U.S.C. 141, *et seq.*)

20*National Labor Relations Board v. Katz*, 369 U.S. 736, 747-8 (1962) in which this Court noted: "It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of Sec. 8(a) (5), without also finding the employer guilty of overall subjective bad faith. *While we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action*, no such case is presented here." (Emphasis supplied.) Cf. *Vickers, Inc.*, 153 NLRB No. 45 (1965) in which lack of anti-union animus or bad faith appears to be a controlling factor in finding absence of violation of Section 8(a) (5).

Section 10(a) of the National Labor Relations Act limits the Board to preventing any person from engaging in any unfair labor practice affecting commerce and confined those unfair labor practices to those *"listed in section 8."* Thus, if the conduct is not barred by "section 8" the Board is without jurisdiction. Those subsections alleged to have been violated by this Respondent Employer in the situation at hand are Sections 8(a) (1) and 8(a) (5). Section 8(a) (1) is routinely charged in all Board cases. The Board has gone so far in this respect as to already point in its prepared forms of Charge Against Employer that, among other sections, Section 8(a) (1) is violated. No time is spent on the 8(a) (1) aspect simply because there was no evidence of such in these proceedings and it can be fairly and readily assumed that the defeat of the 8(a) (5) charge will defeat the Board's entire case.

Section 8(a) (5) provides that an employer who refuses to bargain collectively with the representatives of his employees is engaged in an unfair labor practice. When applied to the case at hand, at no time has the Respondent Employer declined to meet and discuss fully the issue of its inauguration of a premium pay plan which was initially raised in these proceedings by the Union. The evidence is clear that the Union did not want to discuss the plan and made no effort to do so. It simply and unilaterally wanted the plan discontinued although the plan did not reduce the contractually required minimum rate of pay nor did it require any employee to do more work than he wanted to do. The thrust of the premium pay plan was to reward employees when they voluntarily chose to exert

the additional skill, special fitness, aptitude or the like necessary to qualify for the premium pay.

Section 8(a) (5) is simply a repetition of Section 8(5) of the original National Labor Relations (Wagner) Act. However, under the Wagner Act the concept "to bargain collectively" was not defined. It is defined in Section 8(d) of the present Act.

When the present Act was under consideration, both Houses of Congress were perturbed with the course that had been taken by the National Labor Relations Board under the original Act.[21] As a consequence, each House, in substantially similar terms, set out to define the terminology "to bargain collectively." Insofar as pertinent to the situation here before this Court, that definition provided,

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[21]The House Committee on Education and Labor commented in its Report which accompanied H.R. 3020: " 'Bargain collectively' and 'collective bargaining': The present act does not define these most important terms. Some of the most glaring injustices of decisions of the present Board arise from that omission." The Committee then cites with approval the analysis of this Court in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937):

"The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent an employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine * * *'." The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the act in itself does not attempt to compel * * *."

The Report continues: "Notwithstanding this language of the Court, the present Board has gone very far, *in the guise of determining* whether or not employers had bargained in good faith, in *setting itself up as the judge of what concessions an employer must make* and of the proposals and counterproposals that he may or not make. * * *" (Emphasis supplied to demonstrate the parallel between the situation at that time which caused the Congress to curtail the Board, and the situation now in which the Board, in its decisions (without the full knowledge of the area and

(Continued on Page 39)

both in the Bill approved by the Committee and in the Bill passed by the House, as follows:

> "(11) The terms 'bargain collectively' and 'collective bargaining' as applied to any disputes between an employer and his employees or their representative, mean compliance with the following minimum requirements:
>
> "(A) If an agreement is in effect between the parties providing a procedure for adjusting or settling such disputes, following such procedure."[22]

Thus, applying the intent of the House, as shown by the above language, the most that could be required here is what has occurred, namely that the parties follow the procedure of their contract in an effort to resolve the dispute between them. This was done.

(Continued from Page 38)

industry), concludes: "Such an intent is so contrary to labor relations experience * * *" R. 99) The Report continues: "The Board has held it 'unfair' for an employer to insist that he and the union settle their differences by collective bargaining, instead of submitting them to some form of 'collective litigation' like arbitration (citing cases). * * *" The Report concludes: "These cases show that *unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective bargaining agreements.* (See T. R. ISERMAN, INDUSTRIAL PEACE AND THE WAGNER ACT, McGraw-Hill Book Co., Inc., New York (1947), pp. 31-35; HAROLD W. METZ, LABOR POLICY OF THE FEDERAL GOVERNMENT, the Brookings Institution (1945), p. 73)" House Report No. 245 on H.R. 3020, 80th Cong. 1st Sess., pp. 19-20; 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 310-11.

The Senate recognized the problem by also including in its original Committee Bill, and subsequent Bills, a provision defining the term "to bargain collectively," S. 1126, 80th Cong., 1st Sess. and H.R. 3020, 80th Cong., 1st Sess. as amended and passed by the Senate. (See 1 Legis. Hist. of the Labor Mgmt. Relations Act, 1947, 114-5, 242-3, 310-1, 430).

[22]Section 2 (11), H.R. 3020, 80th Cong., 1st Sess. (1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 36-40, 163-7).

The Senate definition, with modification, was ultimately accepted by the Conference Committee and the Congress following passage of two different Bills by each House of the Congress.[23] The Conference Report of the House Managers indicates that they believed the Senate definition to simply embellish their own concept, and supplemented their observations:

> "* * * One of the important changes in the inclusion of a provision indicating that the duty to bargain is not to be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. *In addition, the conference agreement omits from the Senate amendment words that were contained therein which might have been construed to require compulsory settlement of grievance disputes and other disputes over the interpretation or application of the contract.*"[24] (Emphasis supplied)

The foregoing, coupled with the articulateness of the many Senators and Representatives who wanted to prevent the Board from being overburdened with litigation, makes it extraordinarily clear that Congress did not intend the Board to embark on a program of interpreting or applying contracts.

The Senate, at the time it considered the Conference Committee Bill, was advised by Senator Taft, Senate Man-

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[23]Section 8(d), S. 1126, 80th Cong., 1st Sess; Section 8(d), H.R. 3020, 80th Cong., 1st Sess. as it passed the Senate. (1 Legis. Hist. Labor Mgmt. Relations Act. 1947, 114-5, 242-4).

[24]House Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 35 (1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 539).

ager of the Conference, that while the Conference Committee Bill followed the Senate Bill in this regard, the Senate Conferees had declined to accept the definition of the House Bill chiefly because of its strike ballot requirement.[25]

The language of Section 8(d) of the Act itself makes it obvious that Congress did not have in mind that the Board should attempt to substitute its judgment for the judgment of the parties or that the Board was to interpret or construe the provisions of a labor agreement for the parties. First, the Section places upon the parties a mutual obligation to meet with each other at reasonable times and to confer in good faith "with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, *or any question arising thereunder*, • • • but such obligation does not compel either party to agree to a proposal or require the making of a concession: • • •" (Emphasis supplied.) Second, the Section states that once a collective-bargaining agreement is effective neither party may terminate or modify the contract without pursuing a given set of procedures, and states further: "• • • and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. • • •" This illustrates the intent of Congress that the parties, when they have once agreed to the contractual terms, are not to

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[25] 93 Cong. Record 6601 (June 5, 1947), 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 1541.

be considered obligated to revise those terms during the term of the contract. In the case at hand, the Union did not want to abide by the terms of the agreement it had entered into but sought to circumvent them by seeking the Employer to withhold its application of those terms and by seeking the aid of the Board in contending the Employer committed an unfair labor practice in applying those terms.

The intent of Congress that the Board was not to have the right to interpret collective bargaining agreements as a normal course of its responsibility or be involved in breach of labor contracts is further evidenced by the legislative history of the current Act. The original Bill before the Senate reported out by the Senate Committee on Labor and Public Welfare, and the Bill that ultimately passed the Senate, accepted a provision of an earlier Bill (S. 858, 80th Cong., 1st Sess.) which provided as Section 8(a) (6) as follows:

> "Section 8. (a) It shall be an unfair labor practice for an employer—
>
> "(6) to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration: *Provided*, that the Board may dismiss any charge made pursuant to this paragraph if the labor organization has violated the terms of such agreement or has failed to comply with an order of the Board."

In addition, that Bill also provided as Section 8(b) (5) as follows:

> "Section 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

"(5) to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration: *Provided*, that the Board may dismiss any charge made pursuant to this paragraph if the employer has violated the terms of such agreement or has failed to comply with an order of the Board."[26]

The thrust of these provisions was explained by their author, Senator Wayne Morse, who stated:

"• • • While it is my view that unions and employers should settle their contractual disputes by collective bargaining and voluntary arbitration, I recognize the force of the argument that existing law affords only nebulous remedies to employers as well as unions in case the other party has violated the contract. Should such a provision be adopted by the Congress it will be my hope that the Board would devise regulations and pursue a policy which would minimize the number of contract violation cases accepted under these proposals."[27]

Thus, it is quickly ascertainable that here was an attempt to place contractual matters under the jurisdiction of the Board, but with the further admonition that the Board should "minimize the number of contract violation cases accepted under these proposals."

Continuing, Senator Morse said:

"• • • I am seeking here to provide machinery and procedures whereby the National Labor Relations Board will have jurisdiction to take cognizance of charges filed by employers alleging the unfair labor

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[26] S. 1126 as introduced by the Committee and H.R. 3020 as passed by the Senate, 80th Cong., 1st Sess; 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 111, 114, 239, 241.

[27] 93 Cong. Record 1910 (March 10, 1947), 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 982.

practice of violating a contract. I think that will involve primarily a question of fact in both instances. Under my proposal, as I see it, it would become the duty of the Board to determine whether or not the parties have exhausted their remedies under their own contract, and, if they have not, they should be ordered to do so. * * *"

"It would be a great mistake for the Federal Government to undertake to adjudicate as unfair labor practices all alleged violations of collective bargaining contracts. Certainly this procedure should not be used until the parties have exhausted the remedies available under their contract or through voluntary arbitration."[28]

The Report of the Senate Committee on Labor and Public Welfare in reporting out S. 1126, with the "violation-of-contract" unfair labor practices sections included, noted:

"Section 8(a) (6): This amendment makes it an unfair labor practice for an employer to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration. Similar conduct on the part of a union is made an unfair labor practice in section 8(b) (5). While title III of the committee bill treats this subject by giving both parties rights to sue in the United States district court, the committee believes that such action should also be available before an administrative body. It is contemplated that the Board would devise regulations and pursue a policy which would minimize the number of contract violation cases accepted under this proposal. It would become the duty of the Board to determine whether the parties have exhausted their remedies under their own contract."[29]

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[28]93 Cong. Record 1910-1911 (March 10, 1947); 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 982-3.

[29]Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess. pp. 20-1; 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 426-7.

The Report continued as follows in analyzing Section 8(b) (5) of S. 1126:

> "* * * The committee wishes to make it clear that by this provision and the provision making contract violations by employers unfair labor practices, it is not intended that the National Labor Relations Board shall undertake to adjudicate all disputes alleging breach of labor agreements. Any such course would be inimical to the development by the parties themselves of adequate grievance-handling and voluntary arbitration machinery. It is the purpose of this bill to encourage free collective bargaining; it would not be conducive to that objective if the Board became the forum for trying day-to-day grievances or if in the guise of unfair labor practice cases it entertained damage actions arising out of breach of contract. Hence the committee anticipates that the Board will develop by rules and regulations a policy of entertaining under these provisions only such cases alleging violation of contract as cannot be settled by resort to the machinery established by the contract itself, voluntary arbitration, or if necessary by litigation in court. Any other course would engulf the Board with a vast number of petty cases that could best be settled by other means. In short, the intention of the committee in this regard is that cases of contract violation be entertained on a highly selective basis, when it is demonstrated to the Board that alternative methods of settling the dispute have been exhausted or are not available."[30]

Only the Senate Bill reported by the Committee on Labor and Public Welfare and the House Bill as amended and ultimately passed by the Senate included such a provision, making contract violations [redacted] unfair labor practices. No comparable provision was to be found in any of the House legislation on this subject. Both the

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[30]Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess. pp. 22-3; 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 430-1.

Senate and House Bills did include provisions to make the violation of contracts subject to prompt and speedy legal and equitable relief before the Courts, which was ultimately made manifest in Section 301. The foregoing analysis of that portion of the Senate Bills clearly illustrates the narrow area in which even the Senate was willing to permit the Labor Board to act in handling problems over contract administration. When it is realized that the Senate (and the House) ultimately discarded the proposed Sections 8(a) (6) and 8(b) (5) it is clear that neither branch of Congress intended that the Labor Board should be involved in contract administration or enforcement. In the present case, we see an apparent effort on the part of the Board, after years of quiescence in this area, to enlarge its jurisdiction.

Both Houses of Congress, however, did intend that their legislation would provide a means of relief for either party to a labor contract. Their intent was to provide the broadest form of relief, but not through the National Labor Relations Board. As a result, the House incorporated within its originally reported Bill, H. R. 3020, as Section 302(a), the following:

> "Any action for or proceeding involving a violation of an agreement between an employer and a labor organization or other representative of employees may be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such agreement affects commerce, or the court otherwise has jurisdiction of the cause."

When this portion of this Bill was considered by the House, the following colloquy occurred:

> "Mr. BARDEN. Mr. Chairman, I take this time for the purpose of asking the Chairman a question, and in asking the question I want it understood that it is intended to make a part of the record that may hereafter be referred to as history of the legislation.
>
> "It is my understanding that section 302, the section dealing with equal responsibility under collective bargaining contracts in strike actions and proceedings in district courts contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances; in other words, proceedings could, for example, be brought by the employers, the labor organizations, or interested individual employees under the Declaratory Judgments Act in order to secure declarations from the Court of legal rights under the contract.
>
> "MR. HARTLEY. The interpretation the gentleman has just given of that section is absolutely correct."[31]

The Senate included virtually identical provisions within Section 301 (Title III) of S. 1126 and H.R. 3020 as amended and passed. The Committee Report observes that "Title III gives labor unions the right to sue and be sued as legal entities for breach of contract in the Federal courts."[32] It also noted that:

> "The committee bill makes collective-bargaining contracts equally binding and enforceable on both parties. In the judgment of the committee, breaches of collective agreements have become so numerous that it is

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[31]93 Cong. Rec. 3734 (April 17, 1947); 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 840.

[32]Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess. p. 3; 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 409.

not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur (as the bill *proposes* to do in title I).[33] We feel that the aggrieved party should have the right of action in the Federal courts. Such a policy is completely in accord with the purpose of the Wagner Act which the Supreme Court declared was 'to compel employers to bargain collectively with their employees to the end that an employment contract, binding on both parties, should be made' * * *."[34]

The Committee Report also observed:

"Section 301 is the only section contained in this title [title III]. It relates to suits by and against labor organizations for breach of collective bargaining agreements and should be read in connection with the provisions of section 8 of title I also dealing with breach of contracts. * * *"[35]

Senator James Murray in analyzing Sections 8(a) (6) and 8(b) (5) and Section 301 of S. 1126 made these observations:

"Finally sections 8(a) (6) and 8(b) (5) together with Section 301 would give rise to a conflict of jurisdiction between the National Labor Relations Board and the United States district courts. This latter section permits suits in the United States district courts for violations of collective-bargaining agreements. Parties to such agreements have the choice of bringing their action before the Board or the United States district courts. Obviously the necessity for uniform decisions

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[33]Emphasis supplied. This passage presupposes that without the proposed language (which was eventually omitted from the approved legislation) the Board would not have authority in contract administration.

[34]The Committee cited *H. J. Heinz Co. v. National Labor Relations Board*, 311 U.S. 514 (1941). This extract taken from Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess. p. 15; 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 421.

[35]Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess. p. 30; 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 436.

in such matters and the avoidance of conflicting decisional rules by judicial bodies make this legislative scheme wholly undesirable."[35a]

As has already been noted, ultimately, when the National Labor Relations Act, as amended, was passed, the Senate discarded the provisions making violations of contracts an unfair labor practice while retaining substantially the equivalent of section 302 of the House Bill and section 301 of the Senate Bill.

All of the foregoing legislative history is tied together when it is observed that the Senate and the House dropped the added proposals of making contract violations and the violations of certain agreements unfair labor practices while retaining Section 301. The House Conference Report noted:

> "The Senate amendment contained a provision which does not appear in Section 8 of the existing law. This provision would have made it an unfair labor practice to violate the terms of a collective bargaining agreement or an agreement to submit a labor dispute to arbitration. The conference agreement omits this provision of the Senate amendment. *Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.*[36] (Emphasis supplied.)

Senator Robert A. Taft, Manager of the Senate Conferees, in reporting the Conference Bill to the Senate concurred:

"When the bill passed the Senate it also contained a

[35a]93 Cong. Rec. 4153 (Apr. 25, 1947); 2 Legis. Hist. Labor Mgmt. Relations Act, 1947, 1043. See also Min. Report No. 105, Pt. 2 on S. 1126, 80th Cong., 1st Sess. p. 13; 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 475.

[36]House Conference Report No. 510 on H.R. 3020, 80th Cong., 1st Sess. pp. 41-2; 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 545-6.

sixth paragraph in this subsection [Section 8] which made it an unfair labor practice for an employer to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration. *The House conferees objected to this provision on the ground that it would have the effect of making the terms of every collective agreement subject to interpretation and determination by the Board, rather than the courts.* The Senate conferees ultimately agreed to its elimination as well as the deletion of a similar provision contained in subsection 8(b) (5) of the Senate amendment which made it an unfair labor practice for a labor organization to violate the terms of collective-bargaining agreements. The provisions of the Senate amendment which conferred a right of action for damages upon a party aggrieved by breach of a collective-bargaining contract, however, were retained in the conference agreement (section 301). If both provisions had remained, there would have been a probable conflict of remedies and decisions."[37] (Emphasis supplied).

Thus, Congress did not intend the Board to interpret, construe or administer collective bargaining agreements as a normal or usual practice. This is further borne out by Section 201 of the Labor Managements Relations Act. (See Appendix, *infra*, p. 80) There it is made exceedingly clear that the settlement of issues between employers and employees can best be accomplished through collective bargaining and such can be advanced by making governmental mediation facilities available. In Title II of the Labor Management Relations Act an independent agency, the Federal Mediation and Conciliation Service was established. Succinctly, in Section 203(d), the Congress stated:

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[37] 93 Cong. Record 6600 (June 5, 1947); 2 Legis. Hist. Labor Mgmt. Relations Act, 1947, 1539.

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * *"

Nowhere within the framework of the statutory provisions declaring the policy of the United States or the functions of Federal Mediation is there found any reference either to the Board having authority in this area or suggesting resort to the Board to make determinations concerning the proper interpretation, construction or administration of a labor agreement.

While initially the Senate would have had the Board interpret and construe labor contracts as a normal activity by declaring that a breach of a labor contract was an unfair labor practice, it retreated from that position and joined with the House in not granting that authority to the Board. On the other hand, both Houses of Congress did contemplate through Section 301 that the Courts would have broad authority in this area so that parties to a collective bargaining agreement would be amply protected.

The foregoing also illustrates the Congressional intent to keep the administrative processes of the Board objective. While it is impossible to avoid political overtones in an appointive administrative agency, Congress sought to do so by the careful standards it established. The fact that matters of interpretation and application of labor contracts were removed from the Board's jurisdiction and awarded to the Courts is no mere accident. The Courts are renowned for their unbiased approach to the matters before them and

are made up of those highly skilled in dispensing justice without political coloration. To allow the Board to interpret labor contracts could permit political idealogy to be inserted at the heart of the ultimate objective of free and unfettered collective bargaining.

The legislative history and this legislation verifies the Congressional intent to minimize government intervention in collective bargaining. If there is any doubt, the Board's processes should not be imposed upon parties engaged in free and normal collective bargaining.

In a free society industrial conflict is inevitable. Congress recognized this fact and sought not to repress it but placed only a minimum of regulation upon it. Congress did not intend to impose solutions nor provide a basis for the Board to do so. It sought to promote collective bargaining not thwart it.

B. A Brief Reference To The Wagner Act.

The unfair labor practice specified in Section 8(a)(5) of the present Act is simply a repeat of Section 8(5) of the original National Labor Relations act.[37] The legislative history of that Act further supports the contention of the Respondent here. At the time S. 1958 was being considered by the 74th Congress, an amendment to Section 8(5) was proposed which read as follows:

"It shall be an unfair labor practice for either party to an agreement that has been registered pursuant to

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[37] S. 1958, 74th Cong., 1st Sess. Ch. 372, July 5, 1935 (49 Stat. 449)

> Section 12 of this Act, to violate or to fail to observe any condition of such agreement."[38]

That proposal, including the accompanying amendment to Section 12 necessary to accomodate it, was not accepted. The debates indicate that Congress felt that this was going too far in the obligation to bargain collectively as provided for under Section 8(5) for there appears to have been no effort to provide substitute language or to argue that the foregoing was included in the language ultimately accepted in that Act.

As a consequence, neither the legislative history of the present Act nor its predecessor supports the reasoning of the Board offered in the matter at bar.

C. Collective Bargaining, The Ultimate Consummation of National Labor Policy, A Characteristic of Timber Products Industry and Respondent's Labor Contract.

The Board argument emphasizes the lack of an arbitration clause in the collective bargaining agreement here under consideration. This is not unusual in the timber products industry of the Pacific Northwest where the parties to a labor contract prefer to work out their own problems by the give and take of collective bargaining. As the U.S. Department of Labor noted in a recent study:

> "Five industries—tobacco, *lumber and wood products*, primary metals, transportation equipment, and con-

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[38] I Legis. Hist. National Labor Relations Act 1935 (U.S. Govt. Print. Off., 1949) 1137. See also testimony of William H. Davis then Chairman, Special Committee on Government and Labor of the Twentieth Century Fund, Inc., later Chairman of the National Defense Mediation Board and first Chairman, National War Labor Board (World War II) II Legis. Hist. National Labor Relations Act 1935 2090-2109 at pp. 2101-2.

struction—accounted for over two-thirds of the agreements without provision for arbitration. * * *"[39] (Emphasis supplied.)

And, as pointed out by Benjamin Aaron in his discussion of arbitration on the west coast:

"* * * A typical agreement in the lumber industry, for example, provides for a five-step grievance procedure but *makes no reference to arbitration*. Reliance upon self-help rather than upon arbitration has been traditional in this industry. * * *. * * * Now the employers are said to be unwilling to abandon the traditional pattern of dispute settlement; at any rate, arbitration has not yet gained much of a footing in the industry."[40] (Emphasis supplied.)

The existence or lack of existence of arbitration as a last step to grievance procedures was not made a matter of evidence or testimony in these proceedings. However, if pertinent, it can be shown that no contracts in the timber products industry, including plywood manufacture, in the State of Montana include arbitration as the last step (or any step) in the resolution of grievances or any other difficulties. This is also generally true in the neighboring states of Idaho, Washington and Oregon, although on occasion arbitration is accepted on an *ad hoc* basis.

On the other hand, applying the reasoning of this Court in *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 566 (1960):

"Section 203(d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U.S.C. Sec. 173(d) states,

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[39] U.S. Dept. of Labor Bulletin No. 1425-1 (1965) p. 56.

[40] Benjamin Aaron, *The Use of Arbitration*, 82 MONTHLY LABOR REV. (U.S. Dept. of Labor May, 1959) 543.

> *'Final adjustment by a method agreed upon by the parties* is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * *' That policy can be effectuated *only if the means chosen by the parties* for settlement of their differences under a collective bargaining agreement is given full play." (Emphasis supplied.)

Thus, the fact that the parties here chose not to include arbitration within their collective bargaining agreement in no way detracts from the policy which can be effectuated *only* if the *means chosen by the parties* is given full play.[41]

D. Applicable Precedents Support Respondent's Thesis.

Respondent understands that this Court has before it the Brief of Respondent herein in Opposition to Petition for Certiorari in this matter. As a consequence, this Court's attention is respectfully invited to that portion of that Brief found at pages 16-22 thereof. Particular attention is directed to the point made by Justice Jackson speaking for a

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[41]While the Respondent is not critical of arbitration of labor disputes when that means is selected by the parties, nothing in the history of federal labor policy indicates that the National Labor Relations Board is to statutorily substitute itself in labor disputes as an arbiter in the absence of an agreement providing for arbitration. As noted in n. 10, *supra*. p. 31 Congress did not intend to legislate compulsory arbitration in any sense. Even in its strong concern for the settlement of labor disputes creating national emergencies it declined the temptation to legislate compulsory arbitration. (Secs. 206-210, Labor Management Relations Act, 1947). Attention is also directed to the dissent that has developed questioning arbitration as the "ultimate" solution to labor disputes. See Paul R. Hays, LABOR ARBITRATION: A DISSENTING VIEW, Yale Press, New Haven, Conn., 1966; Francis A. O'Connell, Jr., WHAT'S WRONG WITH ARBITRATION, NAM Institute Monograph No. 364, 1966; and O'Connell, *The Duty to Bargain: Effect of Recent Decisions* 59 LRRM 58 (1965). Hays is a U. S. Court of Appeals Judge (CA 2) and an impartial arbiter of 23 years. O'Connell is a long time Director of Industrial Relations, Olin Mathieson Chemical Corp., New York, N.Y.

unanimous Court in *Terminal Railroad Assn. v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6 (1943):

> "The Railway Labor Act like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them * * * So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. * * *"

The following statement of this Court in *National Labor Relations Board v. American National Insurance Co.* 343 U.S. 395, 404 (1952) is most pertinent:

> "Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. *And it is equally clear that the Board may not, either directly or indirectly compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.*" (Emphasis supplied.)

The rule was stated thusly in *Local 1976, United Brotherhood of Carpenters v. National Labor Relations Board*, 357 U.S. 93, 108 (1958):

> "* * * But the Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice. * * *"

Garner v. Teamsters Union, 346 U.S. 485, 490 (1953) made the point that the Board has responsibility for primary interpretation and application of the rules established

under the National Labor Relations Act. However, as this Court itself noted in *Dowd Box Co., Inc., v. Courtney*, 368 U.S. 502, 513 (1962) "Congress expressly rejected that policy with respect to collective bargaining agreements by rejecting the proposal that such violations be made unfair labor practices. Instead, Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.'"

This view is also supported by decisions of the Courts of Appeal. Attention is especially directed to the Ninth Court of Appeals decision in *Square D Co. v. National Labor Relations Board*, 332 F. 2d 360 (1964) and the decision of Fifth Court of Appeals in *Sinclair Refining Co. v. National Labor Relations Board*, 306 F. 2d 569 (1962), both cited with approval in this case by the Ninth Court. [42]

E. The Board Caseload Already Overburdened.

The legislative history relating to the National Labor Relations Board is illustrative of the strong concern of Congress that the Board not be overburdened. This was shown in the discussion of the 1947 amendments to the National Labor Relations Act, *supra*, p. 40, 43-4. In Congressional debates leading to the passage of the Labor Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 29 U.S.C. 401) Congress was concerned with the burgeoning caseload of the Board at that time and chose to permit the Board, by amendment of the National Labor Rela-

[42] Applicable decisions of other Courts of Appeal are found at pp 23-4 of Respondent's Brief in Opposition to the Petition herein.

tions Act, to delegate certain of the authority that it theretofore held to its Regional Directors.[43]

As a practical matter, however, the Board's caseload has not been lessening even today. Its most recent Annual Report indicates that during fiscal 1965 not only have the number of unfair labor practice cases filed with it risen but that refusal to bargain charges against employers were nearly 25 per cent more numerous than in the prior fiscal year.[44] While time has not permitted assembling proof, Respondent believes no small amount of the latter increase is the result of decisions of the Board comparable to its decision in this case. The Board's first quarterly report for calendar 1966 indicates that it received more petitions for representation elections than in any three month period in the Board's history.[45] To grant the Board's position in the matter at hand is certainly not going to improve either the Board's caseload nor the time involved to process these matters.

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[43]S. 1555, 86th Cong., 1st Sess., Pub. Law 86-257, Title VII, Sec. 701 (b) amending Sec. 3(b) of the National Labor Relations Act, as amended. See also S. Rept. No. 187, 86th Cong., 1st Sess. on S. 1555 at pp. 26, 35-36, 73-74, 102, 119 (I Legis. Hist. Labor-Mgmt Repting and Discl. Act of 1959 (U.S. Govt. Print. Off. 1959) 422, 431-2, 469-70, 498, 515). House Rept. No. 741, 86th Cong., 1st Sess. on H.R. 8342 at pp. 18, 24 (I Legis. Hist. Labor-Mgmt Repting and Discl. Act of 1959, 776, 782.)

[44]Thirtieth Annual Report of the National Labor Relations Board (U.S. Govt Print. Off. 1966) p. 7 noting a new record of unfair labor practices charged as well as a new record in refusal-to-bargain charges.

[45]*Report of National Labor Relations Board*, First Quarter 1966, Release S-111, May 24, 1966. The Board's Report for Second Quarter 1966, Release S-112, Sept. 5, 1966 indicates a high total of 4317 unfair labor practice charges filed. On June 30, 1966 9394 cases of all types (6654 were unfair labor practice matters) were pending disposition at various procedural levels as compared to 8884 a year earlier (5731 of which were unfair labor practice matters.)

F. Other Considerations.

The fact that the contractural provision relied upon arguably covers the situation to which the Respondent Employer sought to apply it, in the absence of any bad faith or anti-union animus, should be sufficient to support the view that the Board is without jurisdiction to enter into the interpretation of the labor agreement. That there was no showing of an effort to undermine the Union is an important consideration supporting the Respondent's viewpoint herein.[46]

Prominent labor law authorities agree that the National Labor Relations Board should not intervene in any issue of contract interpretation which is cognizable under the grievance or arbitration provisions of an agreement where the disposition of the contract issue will resolve the unfair labor practice issue or avoid the necessity for facing an unfair labor practice issue.[47] As stated by Dunau in his article on

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[46]Werne, 1 LAW AND PRACTICE OF THE LABOR CONTRACT (Callighan & Co., Chicago, 1957) 1964 Cum. Supp. Sec. 7.150, p.98 observes: "* * * Where there is an alleged breach of contract terms, the National Labor Relations Board is not the proper forum for seeking a remedy unless the employer is motivated by union animus or is acting in bad faith."

[47]See Wollett, *The Interpretation of Collective Bargaining Agreements: Who Should Have Primary Jurisdiction?* 10 Labor Law Journal 477, July, 1959. See also Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 14 Labor Law Journal 1016, December, 1963. A recent case note in 16 Stanford L. Rev. 456, 460 observes "* * * the Board should be less eager to invalidate a contract clause since it thereby interferes with the freedom of the bargaining process." Bowman, *An Employer's Unilateral Action-An Unfair Labor Practice?* 9 Vanderbilt L. Rev. 487, 520 under the heading "Collective Bargaining Agreements and Unilateral action" observes: "If the employer simply failed to comply with his contractual obligations, there might be a private action for damages, but the Board would not become involved unless there appeared to be a conscious campaign to undermine the union." The author recommends that the Board should avoid interpreting labor contracts as often as possible "as it appears to have done at times in the past." (n. 132 at p. 521)

Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems, 57 Col. L. Rev. 52, 65:

"Three convergent elements of the statutory scheme are relevant to the question whether enforceable contractual prohibition of unfair labor practices is compatible with the NLRA. * * * The last of the three relevant elements is the fact that the breach of a collective bargaining agreement is not per se an unfair labor practice. The remedy for a breach does not lie with the NLRB. Depending on the context, the remedy is to be sought either in the grievance and arbitration procedures of the contract, in conventional litigation, or in self-help. *The import of this last element is that the administration of a collective bargaining agreement—its interpretation, application, and enforcement—is not a function of the NLRB.* It would seem therefor that the more closely the contractual prohibition of unfair labor practices ties into the administration of an agreement the more fitting it is to recognize it as being within the province of an arbitrator or court. * * *" (Emphasis supplied.)

At pp. 73-4 the author points out:

"* * * If the action is one for which the agreement provides a valid standard of conduct, the preliminary question is also the only question presented. The dispute within this frame of reference is referable *solely* to the agreement for solution in at least three situations: (1) The action taken by the employer is within the scope of a subject regulated in terms by the agreement; the employer claims that what it has done complies with the agreement, and the union asserts a conflict. * * * (3) An agreement may, expressly or impliedly, confer upon the employer the power to take unilateral action—that is, to alter the status quo without advance notification of or consultation with the union—with respect to a particular subject or subjects. If it does, the employer takes unilateral action in reliance on the committal of the matter to his discretion, the only question presented is whether the action taken

is within the confines of the conferred power.

"The upshot is that only if the action taken by the employer is not regulated by the agreement, either by permitting it or by prohibiting it, is there an occasion during the term of a collective bargaining agreement for application of the statutory principle forbidding the alteration of existing employment terms without bargaining. * * *" (Emphasis supplied.)

To look at this matter from still another point of view, the parties satisfied their "public" obligation by reducing the results of their negotiations to an agreement. The argument over whether or not the agreement serves the purpose to which it was put is a "private" matter, not within the jurisdiction of the Board unless it can be shown that the employer engaged in a course of conduct tantamount to exceeding bad faith or anti-animus.

Finally, the Court's attention is directed to its own pronouncement in *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 103-4 (1962):

"* * * The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might some day be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation would tend to stimulate and prolong disputes as to its interpretation."

Since Congress established, through Section 301, its intent to have disputes involving contractual administration and interpretation submitted to the Courts, it does not appear in the interests of the public policy enunciated by this Court in the *Lucas Flour* case to permit the Board one standard of interpretation and the Courts another. The Board here sought to place a very strained interpretation upon the contractual language. It supposed that premium pay plans involving production incentives were inimical to Union standards. As the Court said in *National Labor Relations Board v. Nash-Finch Co.*, 211 F. 2d 622, 627 (CA 8, 1954):

> "It seems to us that what the Board has done, under the guise of remedying unfair labor practices is to attempt to bestow * * * benefits which it believes the Union should have obtained but failed to obtain * * * as a result of its collective bargaining with the respondent. * * *"

The Board asserts that premium and incentive rates are simply not generally recognized or readily accepted by unions and therefore cannot be implied absent extremely clear contractual language. The Board is wrong. The contractual language here is clear. Secondly, attention is directed to any number of arbitration cases which are based upon the application of premium or incentive pay indicating that such plans are widespread among employers and

unions nationally.[48]

IV. BOARD'S CONTRACTURAL INTERPRETATION IS NOT VALID. RESPONDENT REASONABLY RELIED ON WORKING AGREEMENT.

The following discourse illustrates two facets of this matter. (1) The interpretation provided by the Board is clearly unreasonable and wrong. If the Board has the right to interpret a labor contract where the threshold question to an alleged unfair labor practice is a contractual interpretation, such an interpretation must be reasonable and not as tenuous as the one it provided in this matter. (2) The Respondent's interpretation made of the provision here involved is no less than arguably or colorably applicable, which should prevent the Board from arguing that the Respondent's defense is so unreasonable as to be asserted spuriously and thus ignored.

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[48]See *United States Steel Corp.*, 44 L.A. 774 (1965); *Metal Textile Corp.*, 24 L.A. 726 (1955); *Bethlehem Steel Co.*, 21 L.A. 614 (1953); *Sangamo Electric Co.*, 20 L.A. 639 (1953); *Parke Davis & Co.*, 17 L.A. 568 (1951); *National Lock Co.*, 15 L.A. 945 (1951); *Union Starch & Refining Co.*, 15 L.A. 4 (1950). The Board in its Brief (n. 20, pp. 28-9) frowns upon the well known and established rule preserving unto management all "residual rights" which are not expressly taken away from it in the bargaining agreement. See the discussion of the American Bar Association Section on Labor Relations Law, Committtee on Arbitration and Collective Bargaining Agreements, 1966 Committee Reports at pp. 114-116. This portion of the report was adopted by the majority of the Committee and is supported by the decision of this Court in *United Steelworkers v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 583 (1960) which declared: "Collective bargaining agreements regulate and restrict the exercise of management functions; they do not oust management from performance of them. Management hires, fires, and pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions. A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages. * * *"

A. Section A, Article XVII of Working Agreement.

"The employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like."

The respondent, in good faith, relied upon that language for the establishment and maintenance of the Glue Spreader Premium Pay plan. The rate paid is a premium rate provided for the employees who possess and expend the special fitness, skill, aptitude and the like which in turn is evidenced by the spreader crew in which they are involved exceeding a given quantity of production subject to certain quality controls. While a lack or lack of application of the special fitness, skill, aptitude or the like will nevertheless earn the basic rates provided by the labor contract, the possession and application of a special fitness, skill, aptitude or the like will provide a premium rate of pay.

In any production type operation a special fitness, skill, aptitude and the like is, of necessity, dependent upon outside factors as well as these qualities of the employee himself. The fact that a plan is partially dependent upon a particular employee's fitness and aptitude to coordinate his skills and other fitnesses and aptitudes to others closely related to him in his work activities is but a part of the overall special fitness, skill, aptitude or the like required of him. It is no less a premium pay plan that rewards a particular employee whether it is one in which he alone receives the reward or one in which others may receive a comparable reward in consequence of a harmonious intermeshing of their special fitnesses, skills, aptitudes or the like. The ultimate

reward in either case will be made to a particular employee when the premium is not placed into a pool of some sort and then divided among several employees which it is not in the matter before this Court.

B. Definition of Terms.

> "There is nothing surprising in the Statement that evidence of usage is admissible in the process of interpretation of the words of any contract, or of any other symbols or expressions. How else is interpretation possible? It is usage alone that gives meaning to any word or symbol. An appeal to a dictionary for aid in interpretation is an appeal to recorded usage—or rather, to recorded usages. The better the dictionary, the more varied and numerous are the usages it records. * * *"
> 3 CORBIN ON CONTRACTS (1960 ed.) Sec. 555, p. 228.
> "A reasonable degree of certainty is attained if words are interpreted according to a standard not peculiar to the parties, but customary among persons of their kind under the existing circumstances." 4 WILLISTON ON CONTRACTS (3rd Ed., 1961) Sec. 608, p. 391.

WEBSTER'S NEW INTERNATIONAL DICTIONARY, Second Edition, Unabridged, 1953, (except as otherwise noted) provides the following definitions of the pertinent terms:

Premium in its industrial relations sense is defined in the sense that it is used here as "an additional wage given a worker *for production above a specified amount.*" (Emphasis supplied). WEBSTER recognizes the *premium system* of wage payment and distinguishes between named systems. The explanation given *premium system* is "a system for paying workmen in which the workman's hourly rate is guaranteed and a premium, usually a percentage of his hourly wage, is paid for doing the work in less than the standard time specified." WEBSTER distinguishes then be-

tween the Halsey and Rowan systems as follows: "In the Halsey *premium system* no limit is set to the amount the workman can earn. In the Rowan *premium system* the maximum a workman can earn is double his hourly rate." This explanation makes it clear that the language used by the parties in their Working Agreement contemplated a plan such as the Respondent here initiated for the glue spreader crews.

In Johnson v. Fuller and Johnson Mfg. Co., 183 Wis. 68, 197 N.W. 241, 245 (1924) the Court took note of a premium system in the pay of employees and described it as follows:

> "• • • By the establishment of a premium system an employer held out to the employee an inducement for extraordinary effort. No obligation rested upon any employee, under his contract, to earn a premium. If he performed the duties of the ordinary skillful and diligent employee, the premium did not accrue. On the other hand, if he exerted himself and performed extraordinary services which resulted in his finishing a certain job during a period which was less than the time consumed in the activities of an ordinary employee, he created something of value for the employer. • • •"

In Brown v. Board of Police Commissioners, 58 Cal. App. 2d 473, 136 P. 2d 617, 619 (1943) the Court said: "A premium is a reward or recompense for some act done." Accord: *Hankins v. Ottinger*, 115 Cal. 454, 47 P. 254 (1896).

Fitness is defined by WEBSTER as a "state or quality of being fit or fitted;" "appropriateness or adaptations;" and "mutual adaptation in things associated by nature or art; adjustment; also, an instance of this." *Fit* is defined as "the

quality, state, or manner of being fitted; adjustment; adaptedness. * * *" The term contemplates an adaptation as with other people or things. Thus, the fact that several workmen work in association with each other and are jointly involved in the effort does not destroy the intent of the term *fitness* since the term in one context clearly contemplates the ability to adapt into a situation in association with others.

The Court in *People v. Knauber*, 27 Misc. Rep. 253, 57 N.Y.S. 782, 783 (1899) took note of the definition of *fitness*:

> "'Fitness' is defined by the American Encyclopedia Dictionary so far as is applicable, as follows: '(1) The quality or state of being fit, suitable, or adaptedness. (2) Serviceableness; use; utility.'" * * * "'Fitness' means the quality of being suitable and adapted to the performance of those duties. This in some cases obviously includes habits, industry, energy, ambition, tact, disposition, knowledge of human nature, discretion, shrewdness, suitable physical presence, etc.—matters which require an examination of a very different character from that which may test the competency, excellency, and worth of a candidate. A man may be of great mental competency, moral excellence, and worth, and yet possess very little adaptation for the performance of the duties of the office, because lacking in one or more of the qualities mentioned above under the term 'fitness.' * * *"

Skill is defined by WEBSTER as "the ability to use one's knowledge effectively and readily in execution or performance; technical expertness; proficiency;" "a particular art or science; now usually, a power or habit of doing a par-

ticular thing competently; a developed or acquired aptitude or ability; an accomplishment."

BLACK'S LAW DICTIONARY (4th Edition, 1951) at page 1558 defines *skill* as:

> "Practical and familiar knowledge of the principles and processes of an art, science, or trade, combined with the ability to apply them in practice in a proper and approved manner and with readiness and dexterity."

Aptitude is defined by WEBSTER as "readiness in learning; aptness." It is also defined as "general fitness or suitableness; appropriateness;" "natural disposition or tendency to a particular action or effect;" and, "natural or acquired capacity or ability; talent."

The like is defined as "something similar or of the same kind; anything having a resemblance; as, butter, cheese, and the like."

And the like stated after specific terms is meant to give an extension to those words. Such was held in *Diamond State Iron Co. v. Giles*, 7 Houst. 557, 11 Atl. 189, 195 (Del. 1887) where the Court interpreted "the outside walls of the buildings having trussed roofs, such as churches, public halls, theaters, restaurants, and the like * * *." The words "and the like" were held "to give extension of the uses to which buildings have trussed roofing may be properly applied."

An examination of the various functions performed by the employees on the glue spreader crew, clearly substan-

tiates that special skills, aptitudes, fitnesses, or the like are essential to qualify for the premium pay.

The language "to reward a particular employee" in no way detracts from the interpretation of this provision by the Respondent. The premium provided for here is ultimately only paid to a single employee. As has been observed, the rates of pay contractually established varied between the various jobs of the glue spreader crew. The Core Layer, assuming he performed in a manner which did not result in a premium, received the contractual rate of $2.29 per hour. The premium held out to him was 21 cents per hour. On the other hand, the premium held out to the Core Feeder was 26 cents per hour and the premium held out to a Sheet Turner was 35 cents per hour. The fact that the special fitness, skill, aptitude and the like required of each employee included a degree of interdependence does not detract from the fact that the employee involved was required to use "some special fitness, skill, aptitude and the like" and that the ultimate premium earned was paid to a "particular employee." Seldom will any premium in any manufacturing operation be wholly dependent on but one employee alone. There is real doubt that any sound premium pay plan could be developed for the glue spreader crew which did not accommodate their functional interrelationship.

An evaluation of the foregoing dictionary definitions, the interpretations placed on the words by the Courts, and the terms used in the Working Agreement pertaining to premium pay clearly support the position that the Respondent acted in good faith and had every reason to believe that

the plan initiated by it was permissible under this contract language.

C. Area Custom and Practice under Related Circumstances.

"It is well settled that parties who contract on a subject-matter concerning which known usages prevail, incorporate such usages by implication into their agreements, if nothing is said to the contrary." *Hostetter v. Park*, 137 U.S. 30, 40, (1890).

"Nevertheless, it is the circumstances that surrounded and could have affected the party to the contract that are relevant to the issue, * * *" 3 CORBIN ON CONTRACTS (1960 Ed.) Sec. 536, p. 35.[49]

Custom and practice are constantly relied upon to determine the intent of contractual terms.[50] In the case at hand, the Business Agent who, as the Union's representative, negotiated the agreement now under consideration is also the Business Agent administering the labor contract at the Mount Lolo Lumber Company at Missoula, Montana. (R. 8, 15, 57) The Mount Lolo agreement includes language which is almost identical to that found in the present contract as follows:

"Nothing in this agreement shall be construed as to prevent the Employer from voluntarily advancing any wage rate or scale; *but the advance of any individual rate or scale to reward a particular employee for some special fitness, skill, aptitude, or the like,* shall not be considered a permanent increase in the rate or scale of that position after it has been vacated by a particular individual to whom the increase was granted." (Emphasis supplied. R. 57)

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[49] Such a premise was accepted by this Court in the *Warrior & Gulf* decision, 363 U.S. 574, 578-9 (1960). See Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1002-1005.

[50] 5 WILLISTON ON CONTRACTS, (3rd Ed., 1961) Secs. 648-662, pp. 1-122.

Under that language a premium pay plan was developed whereby crews, made up of two men, are paid a premium when they exceed a given weekly norm of lumber footage loaded into railroad cars. The premium there is also dependent on outside circumstances. The Company employs, one, two and occasionally three such crews. By its employment of more than one crew at a time, and with plant production relatively constant, it is possible that none of the crews may attain the premium. The quantity loaded is not only dependent upon production but also upon the plant transportation system bringing necessary materials to load.

The Stoltze Land & Lumber Company contract with a sister union of the one here involved, also administered by the same Business Agent common to Mount Lolo and Respondent, further illustrates the custom and usage of similar language in the area. That agreement states:

> "Nothing in this agreement shall be construed as to prevent the Employer from paying a premium rate in excess of the agreed upon minimum scale to reward special fitness, skill, aptitude or the like." (R. 59)

Under that agreement the head sawyer is paid a premium of 25¢ an hour, if the plant exceeds an average 80,000 board feet of lumber cut per day measured on a monthly basis. The premium, while paid to an individual employee, is dependent upon the activities of employees who work in conjunction with the head sawyer in the balance of the sawmill operation as well as the Company log supply.

These examples illustrate that the use of the language involved here is not restricted to the activities of a single

employee in isolation from all other employees. These applications of the language here were made known to Mr. Thomason by Mr. Bright prior to the March 12 negotiating meeting. (R. 46, 53-55) These applications were discussed in the presence of the Union in the negotiating meetings that led up to the contract that was executed. (R. 55)[51]

D. Union Was on Notice as to Purpose to which Contract Provision Would Be Put.

The Union representatives were advised of the Respondent's contemplated installation of a premium pay plan under Section A of Article XVII. Mr. Bright was present during negotiations held under the chairmanship of Federal Mediator Clavadetscher and made notes at the time of the discussions with the Union. His notes show the following with specific reference to the matter at hand:

> "Union and company jointly 5 P. M.
>
> "Clavadetscher: Union will recommend a dated union shop and make a provision for students and incorporate present rates in effect on spreader crews.
>
> "Company position unchanged. Company is working on an incentive plan for spreader crews under premium clause.
>
> "Weller[52] was insistent on union shop. Meeting recessed subject to call of either party through F. M. & C. S. or by call of F. M. & C.

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[51] "An important aid in the interpretation of contracts is the practical construction placed on the agreement by the parties themselves." 4 WILLISTON ON CONTRACTS, (3rd Ed., 1961) Sec. 623 p. 789.

[52] Refers to Robert C. Weller, Union Business Agent and Chief Negotiator.

"Recessed 5:10 P.M." (R. 56)[53]

The portion of the meeting above recorded lasted just 15 minutes. The notes make it clear that the parties were meeting jointly. Federal Mediator Clavadetscher outlined what he understood to be the Union proposal to resolve the two remaining issues. Mr. Bright, as one of the two representatives of the Respondent, (with Mr. Thomason), noted the Respondent's response as succinctly as it could have been noted.

Since the notes were made *at the time* there is absolutely no reason to believe that the Company representatives who said they were working on an incentive plan, did not go on to mention that it was to be under the premium clause. The notes were recorded to maintain an accurate record of the progress and status of negotiations. The notes presumptively would be more accurate than anyone's recollection since more than seven months elapsed between the March 12 meeting and the October 16 hearing before the Trial Examiner. Because the notes were made at the time of the occurrence of the event, their reliability is far superior evidence.

While the Union representatives appear to have a slightly different recollection of this advice that an incentive premium plan was contemplated, they do acknowl-

[53]Written memoranda made at the time of a transaction may be considered a part of the *res gestae* and evidence of the fact. *Union Construction Co. v. Western Union Tel. Co.*, 163 Cal. 296, 125 P. 242 (1912) A memorandum made at the time of the transaction and used to corroborate testimony was considered proper and effective even though the witness had no definite recollection in *Nelson & Wallace v. Gibson*, 90 Vt. 423, 98 Atl. 1006 (1916). See also, *Chicago Lumbering Co. v. Hewitt*, 64 Fed. 314 (CA 6, 1894).

edge that the Respondent did communicate to them that it had such a plan in mind at the March 12 negotiating meeting. (R. 12-13). The Union representatives did not voice an objection. They also recall a discussion of premium pay plans in other meetings.

As a consequence of these various factors it is clear that the Respondent had a reasonable basis upon which to interpret the language of the contract involved to apply to the premium pay plan that it established and maintained. It is further evident that the Respondent did so in complete good faith.

E. Portion of Agreement Relied on was Union Waiver of Rights to Bargain.

The Board seems quite concerned that the language involved is not a waiver in terms considered acceptable to it. The Respondent believes that whether or not this is a waiver is actually quite immaterial. On the other hand, if the language involved is anything, it is a reservation of a right as distinguished from a waiver. To apply the Board's reasoning, every right set forth in a labor contract is in one sense or another a "waiver" of the right of either party to bargain on wages, rates of pay, hours and conditions of employment. Under such circumstances, every provision of every contract would receive the scrutiny of the Board were the Union to find the floodgates of litigation opened for them by this Court's acceptance the Board's reasoning. By the very fact that the Board seeks to determine whether or not a "waiver" exists, it injects itself into contract administration and interpretation situations when such intrusion is otherwise unwarranted. The Board, in substance, substi-

tutes its judgment for the agreement of the parties so that it nullifies that agreement. Collective bargaining will be fettered, if not hamstrung under such circumstances.

The First Court of Appeals declined to accept the Board's definition of a waiver in *National Labor Relations Board v. Perkins Machine Co.*, 326 F. 2d 488, 489 (1964) in the following language:

> "We could not agree with the seeming suggestion in that opinion that the parole evidence rule required the waiver to be contained within the four corners of the written agreement."

If the principle of a waiver is necessary to a determination of the merits of this matter, there can be no doubt that all of the elements are present.[54]

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[54] "Waiver is defined in the Restatement of the Law of Contracts p. 400, Sec. 297, comment b, as 'the voluntary relinquishment of a known right.'

"In 67 C.J. 299, Sec. 3, we find the following statement: "To constitute waiver there must be, generally, first, an existing right, benefit, or advantage; secondly, knowledge, *actual or constructive*, of the existence of such right, benefit, or advantage; and, lastly, an actual intention to relinquish it, *or such conduct as warrants an inference of* relinquishment.' *Constantino v. Moreschi*, 9 Wash. 2d 638, 115 P. 2d 955, 961 (1941).

"A waiver is an intentional abandonment or relinquishment of a known right or advantage which, but for such waiver, the party would have enjoyed. It is the voluntary act of the party and does not require or depend upon a new contract, new consideration or an estoppel. It cannot be recalled or expunged . . . *A waiver may be either verbal or in writing; and it is not necessary that the waiver should be direct and positive. It may result from implication and usage*, or from any understanding between the parties which is of a character to satisfy the mind that a waiver is intended. The assent must, however, be clearly established and will not be inferred from doubtful or equivocal acts or language." *Carfi v. DeMartino*, 181 Misc. 428, 46 N.Y.S. 2d 134, 137 (1944) quoted at 5 WILLISTON ON CONTRACTS (3rd Ed., 1961) Sec. 678, pp. 239-40. (Emphasis supplied.)

The right waived was the right to require the Respondent to bargain with the Union prior to the institution of a premium pay plan. The parties are aware of that right inasmuch as they chose to include specific language in their Working Agreement to waive that right. (Section A, Article XVII.) The intention to relinquish it is also found in the language used. However, if that is not sufficient in itself, further evidence is supplied by the use of that language by the here complaining party in other agreements with other employers in the area.

V. BOARD HAS NOT SUSTAINED ITS BURDEN OF PROOF.

The legislative history of the Act here involved demonstrates the concern of Congress that the Board should not substitute its alleged expertness for evidence in the record of proceedings.[55] If the Board, therefore, believed that the Union here did not intend the consequences normally flowing from its consummated action, such evidence, if otherwise deemed proper, should have been presented in the hearing of this matter. But none was presented. The evidence in the record clearly supports the Respondent Employer's contractual interpretation. It does not even remotely support the Board interpretation. The Board's decision relies on: (1) its evaluation of the parties conduct prior to the consummated agreement. But, in fact, the agreement is supposed to have merged into it the prior discussions of the parties so that those discussions are actually no longer important, unless an ambiguity exists and none is believed to exist. (2) The Board asserts a conclusion

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[55]See n. 14, p. 33 *supra* and n. 21, p. 38 *supra*.

upon which no evidence is introduced into the record which will support that conclusion; namely that, in the Board's opinion, the Employer viewpoint is "so contrary to labor relations experience" that it is unacceptable. Nevertheless, there is no evidence in the record to support that conclusion. Instead, the evidence points to conversations prior to the ultimately signed agreement indicating the announced intended utilization of the language agreed upon. The evidence also demonstrates substantially identical application of comparable language in the timber products industry of the area. That practice is shown to exist in plants wherein the Union is represented by the same Business Agent. Finally, the contractual language itself is clearly susceptible to the application made of it.

The foregoing manifests the fact that the Board went outside of the evidence before it on the one hand and on the other hand ruled improperly in the face of the directive of Congress in modifying Sections 10(b), (c) and (e) of the Act to prevent the Board from imposing an expertness it does not have upon the litigants before it. (See Appendix at pp. 79)

The thrust of this argument is that the Board had the burden of proof.[56] That burden has neither been carried nor shifted from it in this case.

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[56]RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE, NATIONAL LABOR RELATIONS BOARD, Series 8, Revised January 1, 1965 (U.S. Govt Print. Off. 1965) Sec. 101.10(b) p. 60; 29 C.F.R. Sec. 101.10(b); *National Labor Relations Board v. Sebastopol Apple Growers Union*, 269 F.2d 705, (CA 9, 1959) wherein the Court said: "* * * The burden was on the General Counsel to establish the unlawfulness of respondent's actions, not upon the respondent to establish its actions were lawful."

The Courts have every right to set aside a Board decision when evidence supporting that decision is not substantial. The decision of this Court in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488 (1951) is controlling. There this Court said:

> "• • • Congress has merely made it clear that a reviewing Court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

Continuing, the Court also stated:

> "• • • The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. • • •"

CONCLUSION

For the foregoing reasons the decision of the Court of Appeals of the Ninth Circuit is correct and should be affirmed. This matter should be remanded to the Board to vacate its Decision and Order and to dismiss the Complaint on file herein.

Respectfully submitted,

GEORGE J. TICHY
Counsel for Respondent

October 15, 1966

APPENDIX

In addition to the provisions of the National Labor Relations Act. (49 Stat. 499), as amended (61 Stat. 136, 73 Stat. 519; 29 U.S.C. 151, *et. seq.*), cited in the Appendix of the Board's Brief (at pp. 31-34) the following excerpts from that Act are also deemed relevant:

Sec. 1 * * *It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * *

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * *

Sec. 10(b) * * * [Referring to proceedings before the Board] Any such proceedings shall, so far as practicable, be conducted in accordance with the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

* * *

Sec. 10(c) * * * If upon the preponderance of the testimony taken the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order * * *. [also] * * * If

upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *

* * *

Sec. 10(e) * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

In addition to the provisions of the Labor-Management Relations Act (61 Stat. 136, 29 U.S.C. 141, *et seq.*) cited in the Appendix of the Board's Brief (at p. 34) the following provisions are also deemed relevant:

Sec. 201 That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interest of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the rep-

resentatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

• • •

Sec. 203(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lockout, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

• • •

Sec. 204 (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a duspute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute.

• • • • •

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No. 53

In the Supreme Court of the United States

OCTOBER TERM, 1966

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

C & C PLYWOOD CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

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In the Supreme Court of the United States

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No. 53

NATIONAL LABOR RELATIONS BOARD, PETITIONER
vs.
C & C PLYWOOD CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

Comes now the C & C Plywood Corporation and respectfully prays the Court to grant a rehearing in this matter.

I.

The decision in this matter warrants a rehearing on several basic and fundamental bases. The first basis results from the absence of any statutory basis upon which the National Labor Relations Board is granted the authority, either directly *or indirectly*, to interpret collective bargaining agreements.

A. What is a violation of the terms of a collective bargaining agreement? A violation of a contract may be a positive act contrary to any of the contract's affirmative or negative terms, a misapplication of any of its provisions or conduct not covered by its terms. It must be assumed that the contract is an embodiment of all of the areas in which the parties directed their negotiations. Such a con-

tract violation is what Congress decided should not come within the purview of the jurisdiction of the Board but should be reserved to the courts. In the case at bar, assuming, *arguendo*, that the Board's interpretation of the labor contract is correct, what is the result? It is most certainly that the employer has violated the terms of the labor agreement, for its conduct does not come within the terms to which the employer sought to apply them. The Respondent does not argue that the Board is without authority in a situation where the interpretation suggested is no more than an obvious sham. But, here we have no sham. Nor does the point here made by the Respondent have any application to a contractual provision which is no more nor less than a repetition of a statutory obligation such as was involved in *Smith v. Evening News Assn.*, 371 U.S. 195 (1962). We are here dealing with a right retained by the Respondent, or granted by the Union, which is spelled out in the contract. If the employer is correct in his interpretation, which he believes firmly, then his conduct is protected by the contract and no violation exists. Thus, the contract, the interpretation applied to it and the conduct are all essential elements of the controversy to be decided. These are the very same necessary elements upon which any litigation involving the violation of the terms of any collective bargaining agreement revolve.

A construction placed upon a contract should be no different whether it is placed thereon in consequence of passing upon statutory obligations or in a determination of the substantive merits of the contractual controversy. To rule otherwise establishes a double standard not warranted under the present posture of our law or this statute. Con-

gress intended that Title I of the Labor Management Relations Act, the National Labor Relations Act, as amended, (61 Stat. 136, 29 U.S.C. 141 *et seq.*) should result in collective bargaining agreements. This decision permits the Board to thwart them.

Congress thoroughly considered giving the Board jurisdiction over the violation of contracts in passing on the Senate version of Section 8(a)(6) and 8(b)(5) but rejected such jurisdiction in favor of leaving such matters to the courts under Section 301.[1] The language of the House Conference Report, at page 42, simply leaves no room for doubt or misunderstanding of Congressional intent with respect to the Board's role in this area:

> "• • • Once parties have made a collective bargaining contract the enforcement of the contract should be left to the usual processes of the law and not to the National Labor Relations Board."[2]

Senator Taft's discussion of the Conference bill, further illustrates this admonition:

> "When the bill passed the Senate it also contained a sixth paragraph in this subsection [Section 8] which made it an unfair labor practice for an employer to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute

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[1]The version of the Senate bill rejected by the Conference Committee contained the following provision:

"Sec. 8(a) It shall be an unfair labor practice for an employer
• • •

"(6) to violate the terms of a collective bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration; • • •" Section 8(b)(5) of the same bill imposed a similar limitation upon labor organizations. S. 1126, 80th Cong. 1st Sess., 1 Legis. Hist. LMRA 109-111, 114.

[2]House Conf. Rept. No. 510, 80th Cong. 1st Sess.; 1 Legis. Hist. LMRA 546.

to arbitration. *The House conferees objected to this provision on the ground that it would have the effect of making every collective bargaining agreement subject to interpretation and determination by the Board, rather than the courts.* The Senate conferees ultimately agreed to its elimination as well as the deletion of a similar provision contained in Section 8(b)(5) of the Senate amendment which made it an unfair labor practice for a labor organization to violate the terms of collective-bargaining agreements. The provisions of the Senate amendment which conferred a right of action for damages upon a party aggrieved by breach of a collective-bargaining contract, however, were retained in the conference agreement (section 301). If both provisions had remained, there would have been a probable conflict of remedies and decisions."[3]

Nothing more is needed to demonstrate that it is not simply an inference, but a clear mandate from Congress that the Board is not to become embroiled in contract interpretation, enforcement or administration. This decision unequivocally contradicts these unmistakable manifestations of Congressional intent.

But we need not stop here to nail down this Congressional intent. Its pervasive intent to keep the Board out of the merits of contending positions in defining the obligation to bargain was underlined in the House Conference Report at page 34 where it is stated:

"• • • Hence, the Senate amendment, while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect as the House bill in this regard, since it rejected, as a factor in determining good faith, the test of making a concession *and thus prevented the Board from determin-*

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[3] 93 Cong. Rec. 6600; 2 Legis. Hist. LMRA 1539. Emphasis supplied.

ing the merits of the positions of the parties."[4] (Emphasis supplied.)

And at page 35 of that Report:

> "• • • In addition, the conference agreement omits from the Senate amendment words that were contained therein which might have been construed to require compulsory settlement of grievance disputes and other disputes over the interpretation or application of the contract."[5]

Congress plainly did not want the Board meddling in the agreement of the parties. It simply sought to define rules for orderly bargaining in the ultimate aim that a collective bargaining agreement would result. That aim was an accomplished fact in the case at bar.

The purpose of Section 8(a)(5) is good faith collective bargaining. No question has been raised concerning the Respondent's good faith bargaining in reaching the agreement. There are no allegations of any unfair labor practices engaged in by the Respondent which can be separated from its good faith interpretation of the contractual provision relied upon. And, even though the Respondent felt secure in its interpretation, it further adhered to the dictates of the statute by indicating and offering its sincere willingness to fully discuss the premium pay plan and all of its ramifications. It was the Union that maintained an intransigent demand for removal of the plan.

B. A careful examination of the legislative history of the Act creating the Board and of the Act itself fails to disclose any point at which Congress suggested or intended

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[4]House Conf. Rept. No. 510, 80th Cong., 1st Sess.; 1 Legis. Hist. LMRA 538.

[5]House Conf. Rept. No. 510, 80th Cong., 1st Sess.; 1 Legis. Hist. LMRA 539.

that the Board should have a general or special power to interpret, construe or administer labor agreements either directly or indirectly or in the process of passing upon statutory questions excepting only with regard to the specific limitations placed upon "union security" and "hot cargo" provisions.

C. Whether the Board is given the right to interpret labor contracts as an incident to its jurisdiction to enforce statutory rights or it is given the right to determine contractual disputes upon their merits, the result is precisely the same. In either instance the Board has been given the jurisdiction to provide a final and binding disposition of the dispute. Thus, if this decision is permitted to stand, the Court will have as effectively given the Board jurisdiction in the administration of contracts as if Congress had decided to give the Board concurrent jurisdiction with the Courts under section 301, which Congress did not intend and said so. This is true in spite of the approval in this decision of the admonition of Congress that the Board should have no unfair labor practice jurisdiction over breaches of contract.

D. This decision suggests that Congress rejected placing in the Board "unfair labor practice jurisdiction over all breaches of collective bargaining agreements." (Slip Opinion, p. 6) But, this is not the substance of what Congress said. Congress has stated that "the enforcement of the contract should be left to the usual processes of the law and not to the National Labor Relations Board."[6] Enforcement of the contract relates to the entire contract or any part of

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[6]Supra, note 2.

it so that it is equally applicable to any breach as to all breaches of the agreement. The foregoing statement was made by Congress in rejecting the Senate version of the bill which made it an unfair labor practice "to violate the terms of a collective bargaining agreement."[7] Thus, it related to *any* of the terms, not to *all* of them. Senator Taft's discussion of the Conference bill, already quoted, notes that the House made its objections to the Senate version "on the ground that it would have the effect of making every collective agreement subject to interpretation and determination by the Board, rather than the Courts."[8] This refers to "every collective agreement" which inherently includes all of its terms. Thus, it is clear that it is not simply an inference to be drawn from the Act and its legislative history but a mandate of Congress making it clear that the Board was to have nothing to do with contract administration.

E. It is necessary to observe that the fear was that "every collective agreement" would be made subject to interpretation and determination, not "all questions of contract interpretation" as has been indicated by the decision in this matter. (Slip Opinion, n. 13, p. 7) While the courts do not have the authority to enforce the union's statutory rights under sections 8(a)(1) and (5), neither does the Board have the right to enforce the interpretation placed upon a labor agreement by either party thereto. This conclusion is borne out by the foregoing discussion of Congressional intent and the reasons why Congress declined to grant such authority to the Board.

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[7] *Supra*, note 1.

[8] *Supra*, note 3.

The foregoing passages of the law and of its legislative history and those already cited earlier in the proceedings in this matter illustrate positively why Congress did not intend the Board to act in contractual disputes for any reason, statutory or otherwise. On the other hand, neither anything in the Act nor in the legislative history of the Act supports the view that Congress in any way intended the Board to become embroiled in contract administration, directly or indirectly, in the determination of statutory rights.

Since the Board is purely a creature of statute, it is imperative that the statute itself be precise in this area so that those it regulates are fully apprised of their rights and responsibilities if we are to preserve due process. This statute is precise in not incorporating reference to general contract administration as a proper Board function.

F. To permit the decision in this matter to remain would confirm the fears of Congress that a grant of authority to both the Board and to the Courts could well result in conflicting decisions. By such confirmation, this decision is shown to conflict with the well-defined intent of Congress to keep the Board out of the area of contract administration, directly or indirectly. To illustrate this point conclusively, the Respondent employer here is not barred by this decision from seeking a declaratory judgment before the Courts of the interpretation of the controverted contractual provision. It is more than likely—it is probable—that the Respondent's good faith interpretation of the provision involved would be vindicated for a Court, under such circumstances, would not be confused with the "expertise" the Board claims to possess. A Court would in no manner

be bound by the decision of the Board. The result could be exactly the kind of conflicting decisions which the Act was intentionally designed to avoid.

G. To create conflicting decisions, if the case at bar is to stand, the only necessary ingredient is a conflicting view by contracting parties to any provision involving a mandatory subject of bargaining. Very few issues in the formation of a labor contract are not included among the mandatory subjects of collective bargaining. It is actually *impossible* to conceive of *any* contractual provision over which the Board may *not* now, in light of the decision in this case, exercise this ultra-statutory authority to the detriment of the judicial process provided in Section 301 of the Labor Management Relations Act, 1947. A party to a labor agreement may believe in good faith that it has the right to proceed in a given manner under the terms of its agreement, which right it would not have absent the contractual provision. It acts. At the time of its action it may not even know or suspect that the other party to the contract does not agree with its interpretation. The other party, seeking an approval of a contrary interpretation, in reality seeking to obtain a decision on the merits, but recognizing the costs associated with court litigation, or even arbitration where a large expense normally adheres, now seeks out the Board for a total cost of a 5¢ postage stamp. The Board, under the precedent of the case here at bar, if it is left to stand, armed with the authority to interpret a contract, theoretically to enforce a statutory obligation, is free to fully examine the contract and the interpretations placed upon it. Whether it declines to proceed or whether it proceeds to a decision, the Board is in either instance

passing upon the merits of the dispute. If the party relying on the controverted contractual provision is found not to have the protection of that proviso, inasmuch as a mandatory subject of collective bargaining is involved, it is, without more, guilty of a refusal to bargain. And on the other hand, if the Board declines to act, the party involved is still free to go to the Courts for relief. The double jeopardy aspects of this are not to be desired.

If this decision is permitted to stand, even the most cautious party to a collective bargaining agreement or one who seeks to resolve all doubts and obtains a decision of a court affirming the interpretation that he maintains, has no security whatsoever from accusations of a refusal to bargain. The cautious party can go to a court, be affirmed in his interpretation, by a declaratory judgment or otherwise, and the disputing party is free to ignore the decision of the court under the guise of seeking to enforce a statutory right. The interpretation of the court can be effectively set aside because the Board, under the decision at bar, has the right to interpret a contract in the determination of statutory violations. It may be suggested that this prospect is far-fetched for the Board has recognized arbitration decisions which meet certain standards that the Board considers to be essential to a fair disposition of an issue so that such a prospect is unrealistic. But, there is no security in this present rule of the Board for the Board has changed its interpretations and precedent *not once but many times* in its administration of the statute in the over thirty years of its history.[9] No litigant before the

[9]Labor Relations Reporter, Special Supplement to Vol. 61, No. 27, Apr. 4, 1966 entitled Major Labor-Law Principles Established by NLRB and Courts.

Board can rest secure in the continuation of a current Board precedent. A change in personnel or a change in politics results in new rules, new decisions, new viewpoints, and new interpretations that did not exist but a few months, weeks or even days before. The Board's extension of comity to arbitration decisions is no different. It is not based upon a statutory direction requiring the Board to extend comity to arbitration decisions. It is rather based only on the present viewpoint of the present and recent members of the Board. While the statute remains the same, its application to substantially the same factual situations by the Board is *ever changing*.

H. The decision of this Court in *Mastro Plastics Corp. v. NLRB*, 350 U. S. 270 (1956) is clearly distinguishable from the case at bar and does not, in fact, form a precedent applicable to the decision at hand.

1. In *Mastro Plastics* the conduct forming the basis for the unfair labor practice was altogether independent of the contract clause to which reference was made. The conduct, which was found to constitute an unfair labor practice, in no manner relied upon an interpretation of a collective bargaining agreement. The unfair labor practice in *Mastro Plastics* would have existed irrespective of whatever interpretation had been placed upon the contractual provision. In the case at bar, without the interpretation placed upon the terms of the agreement by the Board, there is no unfair labor practice. In the case at bar, the Board engaged in conduct barred by Congress which was to determine the merits of the controversy over the contractual interpretation even though it did so in alleged

pursuit of its statutory authority of determining the existence of an unfair labor practice.

2. The question of the Board's authority to construe collective bargaining agreements where such is necessary to the finding of an unfair labor practice was not raised in the *Mastro Plastics* case as it was in the case at bar. Thus, this Court had no occasion to consider the issue and its decision in that case was not related to the issue involved in the case at hand.

3. In the *Mastro Plastics* case there was a substantial factor of overwhelming public policy, namely, whether or not an employer was to be permitted to engage in flagrant unfair labor practices and then seek to deprive the union involved of its statutory right to protect itself from that activity by a strike. The gravity of the independent unfair labor practices involved in *Mastro Plastics* necessitated a drastic result as a matter of public policy. Such overwhelming considerations of public policy are not here involved. The case at hand is characterized by a total absence of any independent conduct which forms the basis of an unfair labor practice. C & C Plywood believed, in good faith, and on an abundance of valid reason, that the contractual provision involved unequivocally supported the conduct that it undertook.

4. *Mastro Plastics* involved an 8(a)(1), (2) and (3) charge. Section 8(a)(5), which forms the basis for the charge in *C & C Plywood* was not in any manner involved in *Mastro Plastics* while Section 8(a)(2) and (3) are in no manner involved in *C & C Plywood*. The statutory considerations are vastly different. While Section 8(a) (1) was involved in both cases, it rested completely

upon the 8(a)(5) considerations in *C & C Plywood* while there appears to have been unmistakable independent 8(a)(1) violations in *Mastro Plastics*.

I. The decision at hand would appear to overrule *NLRB v. American National Insurance Co.*, 343 U. S. 395 (1952) in which this Court stated:

> "• • • And it is equally clear that the Board may not, *either directly or indirectly* compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (Emphasis supplied.)

If the decision at bar is to remain, there is no question that the Board may, with impunity under the guise of enforcing statutory rights, "sit in judgment upon the terms" of the collective bargaining agreement here involved.

II.

The references in the opinion to arbitration and the emphasis placed upon its absence as the means of resolution of labor disagreements appears to have been a paramount consideration in the ultimate decision of this Court. (Slip opinion, p. 3, 5) Such consideration was completely and totally foreign to any necessary evaluation or decision in this matter.

A. The separation of the powers as provided for in the Constitution of the United States contemplates that this Court will interpret the law. The issue in the matter here before this Court rests *wholly* upon statutory fiat and in no manner upon the common law. No search need be made into legislative history as to the intent of Congress with respect to the resolution of labor grievances or disputes

over contract interpretations for Congress explicitly stated in Section 203(d) of the Labor-Management Relations Act (61 Stat. 154, 29 U.S.C. Sec. 173(d):

> "Final adjustment *by a method agreed upon by the parties* is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or *interpretation of an existing collective-bargaining agreement.* • • •" (Emphasis supplied.)

The parties here freely and voluntarily chose *not* to include arbitration as the means of ultimately resolving their differences. Having so chosen, the absence of arbitration should not in any manner be a consideration. To say that it is a consideration legislates in a situation where the Court is without authority to legislate and interprets where the resulting interpretation ignores the Statute and its unambiguous provisions.

B. This Court has recognized the policy of Congress as set forth above in *United Steelworkers v. American Manufacturing Co.*, 363 U. S. 564 (1960) wherein at page 566 this Court observed, after quoting from the foregoing legislative passage:

> "• • • That policy can be effectuated *only if the means chosen by the parties* for settlement of their differences under a collective bargaining agreement is given full play." (Emphasis supplied.)

The decision in this case (No. 53) by placing unwarranted emphasis on arbitration would appear to reverse the impact of the *American Manufacturing* decision. This is neither desirable nor proper in view of the clear admonition of Congress.

C. The "therapy of arbitration" encouraged by the majority opinion of this Court in *Carey v. Westinghouse*, 375 U. S. 261, 272 (1964) was applied only after the parties themselves chose that means for the resolution of their disputes and in no way defied "the means chosen by the parties." The same observation is pertinent to *International Harvester Co.*, 138 N.L.R.B. 923 (1962), aff'd *sub nom. Ramsey v. NLRB*, 327 F.2d 784 (CA 7), cert denied, 377 U. S. 1003 (1964). But for an arbitration provision included in each of the labor contracts in each of those cases, the result of those decisions would have been totally different.

D. This decision records as a substantial consideration in rejecting the Respondent's position in this matter the fact that the failure to reach an agreement might result in a strike, i.e., "economic warfare." (Slip Opinion, p. 5) Yet, when Congress faced this problem it gave full protection to the freedom to strike. Senator Taft made this abundantly clear at the time of the vote to override the veto when he said:

> "Mr. President, we have drafted this bill and it is based on the theory of the Wagner Act, if you please. It is based on the theory that the solution of the labor problem in the United States is free, collective bargaining —a contract between one employer and all of his men acting as one man. That is the theory of the Wagner Act, that they shall be free to make the contract they wish to make.
>
> "Many people have felt that the Government should come in certain cases and impose compulsory arbitration in the fixing of wages, if the parties cannot agree. Our provision for dealing with Nation-wide strikes has been criticized. After 60 days, if they still want to vote for a strike, we have not forbidden it, *because we believe that the right to strike for hours, wages and work-*

ing conditions in the ultimate analysis is essential to the maintenance of freedom in the United States. We have rejected every effort to impose upon any men any wages, hours, or working conditions to which they, through their representatives, do not agree.

"• • • *I think our freedom depends upon maintaining the free right to strike.*"[10] (Emphasis supplied.)

The Conference Report also emphasizes the freedom of the parties in the area of disputes settlements and the total unimportance of arbitration as a factor in legal rights of the parties. At page 62, the Report, in discussing the functions of the Federal Mediation and Conciliation Service, and after noting that a Senate amendment urging voluntary arbitration of labor disputes was rejected, continued:

"• • • The conference agreement, in section 203, does not mention arbitration as such but provides that if the parties cannot be brought to settlement by conciliation and mediation the Service shall seek to induce them voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion. *The failure or refusal of either party to agree to any procedure suggested by the Director is not to be deemed a violation of any duty or obligation imposed.* • • •."[11] (Emphasis supplied.)

This illustrates: (a) that Congress did not intend compulsory arbitration to be a consideration in the industrial relations philosophy of this Nation; (b) that the right to strike was to remain unimpaired; and (c) that that policy

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[10]93 Cong. Rec. 7690; 1 Legis. Hist. LMRA 1653. Congressional intent rejecting compulsory arbitration throughout this legislation is also indicated at 93 Cong. Rec. A896, 3952, 5297; 2 Legis. Hist. LMRA 937, 1008, 1520.

[11]House Conf. Rept. No. 510, 80th Cong., 1st Sess.; 1 Legis. Hist. LMRA 566.

should remain so long as the parties to a contract did not freely agree otherwise. In the present case the parties were thoroughly familiar with arbitration and weighed its merits and pitfalls. To them the disadvantages, and there are many, far outweighed the merits. As a result they chose to settle their differences through negotiations and free collective bargaining. This is not contrary to any federal labor policy. Instead it is in complete harmony with the intent of Congress as reflected in the Labor Management Relations Act and its legislative history. It is simply beyond any consideration that this Court should have interjected this subject into this decision and it is incumbent upon this Court to remove this impediment rejected by Congress. In doing so, it should also remove the thrust of this decision which, irrespective of the angle of examination, places the Board in the position of the compulsory arbiter of contractual interpretations under the subterfuge of ruling upon statutory application.

E. By placing the emphasis that this decision does upon arbitration, the Court substitutes its judgment for the judgment of the parties and in fact subverts the "Act's clear emphasis upon the protection of free collective bargaining" one of the legs alleged to support the Board's decision. (Slip opinion, p. 9) "Free collective bargaining" is exactly the base upon which the relationship between the parties was here involved. The parties voluntarily chose not to substitute the judgment of an arbitrator for their own judgment. Instead they chose to utilize the other techniques of free collective bargaining many of which are far superior in actual practice to the use of arbitrators, unskilled in industrial problems, who are not required to

live with the consequences of their decisions and whose decisions are not subject to appeal to correct errors.

III.

Another basic and fundamental aspect, separately and distinctly, warranting rehearing, is that portion of the pending decision in this matter which accepts the strained and unwarranted interpretation placed upon the provision of the collective bargaining agreement under consideration.

A. The Respondent respectfully points out that the Opinion errs in accepting the Board's interpretation. That acceptance is stated:

> "In reaching this conclusion, the Board relied upon its *experience* with labor relations *and* the Act's clear emphasis upon the protection of free collective bargaining. We cannot disapprove of the Board's approach." (Slip opinion, p.9; emphasis supplied.)

It is urged that the Board's experience is not an acceptable substitute for a preponderance of the testimony or substantial evidence in the record of this particular proceeding. Section 10(c) of the National Labor Relations Act, as amended, is careful to point out:

> "• • • • *If upon the preponderance of the testimony taken* the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall • • • • • • • *If upon the preponderance of the testimony taken* the Board shall not be of the opinion • • • • • • •

on the record considered as a whole shall be conclusive. * * *" (Emphasis supplied.)

The Board has imposed its own view of what the terms and conditions of the labor agreement should be contrary to the evidence and testimony herein. A careful examination of the record of these proceedings fails to come up with one iota *of evidence or testimony* to support the Board's conclusion that:

> "* * * To accept Respondent's construction is tantamount to saying that the Union inferentially surrendered to Respondent the right unilaterally to establish production standards and wage rates based thereon as a method of compensating employees. *Such an intent is so contrary to labor relations experience that it should not be inferred* unless the language of the contract or the history of negotiations clearly demonstrates this to be a fact. * * *" (R. 99; emphasis supplied.)

B. There is absolutely no shred of evidence or testimony in these proceedings to bear out the Board's conclusion. It is simply not due process of the law to find that one is confronted with a decision based upon a conclusion concerning which no evidence or testimony was introduced in the trial on its merits.

The Respondent is not granted the protection of due process of law when a decision turns upon considerations of fact that are not in evidence nor indicated precisely in the pleadings. How can one defend oneself under circumstances such as these?

C. In amending the provisions of Section 10(c) and 10(e) cited above, in 1947, Congress sought to avoid the very situation which has evolved and is accepted in this decision. Congress not once, but on innumerable occasions,

in amending the Act, sought to destroy once and for all the acceptance of the notion of Board "expertness" in the field of labor relations which could be substituted for evidence. The House Conference Report at page 56 states:

> "• • • In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact (*N.L.R.B. v. Hearst Publications, Inc.*, 322 U. S. 111; *N.L.R.B. v. Packard Motor Car Co.*, 330 U. S. 485), or when they rested only on inferences that were not, in turn, supported by facts in the record (*Republic Aviation v. N.L.R.B.*, 324 U. S. 793; *Le Tourneau Company v. N.L.R.B.*, 324 U. S. 793).
>
> "As previously stated in the discussion of amendments to section 10(b) and section 10(c), by reason of the new language concerning the rules of evidence and the preponderance of the evidence, *presumed expertness on the part of the Board in its field can no longer be a factor in the Board's decisions.* • • •" (Emphasis supplied.)[12]

At page 53 of that Report it is observed:

> "• • • If the Board is required, so far as practicable, to act only on legal evidence, the substitution, for example, of assumed 'expertness' for evidence will no longer be possible. The conference agreement in section 10(c) contains this provision of the House bill."[13]

At page 54 the following passage is found:

> "• • • Making the 'preponderance' test a statutory requirement will, it is believed, have important effects. For example, evidence could not be considered as meeting the 'preponderance' test merely by drawing

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[12]House Conf. Rept. No. 510, 80th Cong., 1st Sess.; 1 Legis. Hist. LMRA 559-560.

[13]Supra, note 12 above at p. 557.

of expert inferences therefrom, where it would not meet the test otherwise. * * *"[14]

And at another point on page 56 of that Report:

"* * * The language also precludes the substitution of expertness for evidence in making decisions. It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in *N.L.R.B. v. Nevada Consol. Copper Corp.* (316 U. S. 105) and in the *Wilson* [*Wilson & Co. v. NLRB*, 128 F.2d 114 (1942)], *Columbia Products* [*NLRB vs. Columbia Products Corp.*, 141 F.2d 687 (1944)], *Union Pacific Stages* [*NLRB v. Union Pacific Stages, Inc.*, 99 F.2d 153 (1938)], *Hearst* [*supra*], *Republic Aviation* [*supra*], and *Le Tourneau* [*supra*], etc., cases, *supra* without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into Section 10(e) of the amended act."[15]

There is no difference between an assertion of an "experience" that is superimposed upon a case in lieu of evidence and testimony and the "expertness" examined and rejected by Congress in the 1947 amendments.

The Board is in no way the human embodiment of an ancient wisdom which extends simultaneously on the same terms or logic to all industrial settings or situations. What expertise or experience might indicate is standard or accepted in one industry may be quite foreign to another. Methods of bargaining, meaning to be attributed to contractual terms and provisions, and related considerations are always a function of the specific psychological, economic, sociological, political (for the union is an undeniably political institution) and very often, geographic fac-

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[14] *Supra*, note 12 above at p. 558.

[15] *Supra*, note 12 above at p. 560.

tors which compose the total bargaining context. To generalize to the timber industry an "expertise" derived from the transportation industry, for example, or the automotive industry, is to engage in illusion. For the Board to state, categorically, that the Employer's contentions here are contrary to industrial relations experience is tantamount to an admission by the Board that its industrial relations experience is at best confined, and at worst, non-existent. For such a claim is contradicted by every shred of objective evidence contained within the record of this case. It flies directly in the face of overwhelming evidence of the normality of such an industrial relations experience at this time, in this place, with respect to this union, and the employees encompassed by this union's organizational reach. What is contrary to the industrial relations experience of this group of employees, in this industry, in this region, at this time, is the Board's interpretation of it. The Board suffers from an ideological perspective of what ought to be, not what is. This is hardly a fitting conveyance by which this Court should transport itself along the way of rational decision.

D. The Opinion here suggests that the Court of Appeals did not reach the question of Respondent's interpretation of the collective bargaining agreement provision involved. (Slip opinion, p. 4) The Court of Appeals was obviously not compelled to a conclusion concerning the contract itself in view of its belief that the Board was without jurisdiction in the first instance. However, the Court of Appeals did not fail to pass a judgment on the Board's interpretation, observations that this Court is urged to carefully review. The Court of Appeals observed:

"• • • Indeed, the Board majority 'construed' the contract by looking back to negotiations presumably merged in the agreement, as well as to the provisions of the agreement itself, and by considering also the fact that the union made 'prompt protest' against respondent's action, admittedly taken under what respondent conceived to be a proper interpretation of the agreement.

"We note, moreover, that the rationale of the Board majority, in construing the contract as it did, was as unique as it was circuitous. The course of reasoning was that the provisions of the collective-bargaining agreement are 'so contrary to labor relations experience' that the union should never have executed such a contract; and since the provisions in question should never have been agreed to by the union, it must be presumed that the union did not intend them, since the union's 'prompt protest against Respondent's posting of the new wage schedule . . . belies any such intent'." (351 F.2d 224 at 227; R. 109-110)

The Court of Appeals' disposition of the Board's interpretation is certainly without doubt in the following reference:

"Here, as in *N.L.R.B. v. Nash-Finch Co.*, 211 F.2d 622 (8th Cir. 1954):

> 'It seems to us that what the Board has done, under the guise of remedying unfair labor practices, is to attempt to bestow . . . benefits which it believes the Union should have obtained but failed to obtain . . . as a result of its collective bargaining with the respondent . . .' 211 F.2d at 627" (351 F.2d 244 at 228; R. 41)

E. The promptness with which one files an unfair labor practice charge, a lawsuit, or contests an interpretation made by another is in no manner probative of the correctness of the cause or of the interpretation. Yet, this is one of the precise elements upon which the Board based its judgment concerning the Respondent's contractual interpretation. (R. 99)

IV.

There can be no argument. The issue between the Respondent and the Union was whether or not the Respondent could unilaterally grant premium pay to "any particular employee" based upon the production of a group of employees under the provisions of the labor agreement between the parties, the pertinent portion of which stated:

> "The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like." (R. 67-8)

Irrespective of the direction from which this issue is considered, the arbiter of the issue is squarely faced with whether or not the interpretation placed upon that provision is valid. Should we argue that the assertion of the privilege of establishing the premium pay plan here involved was pure sham, then the issue involved does not in fact require an interpretation of the labor contract and we thereafter confront a totally different issue, namely whether or not the residual rights of management or management prerogatives permit the employer inauguration of such a plan under the facts of this case. But, there is no necessity to argue or consider residual rights of management or management prerogatives because the interpretation placed upon the agreement by the Respondent was correct and proper.

This Court seems to have misunderstood both the Court of Appeals and this Respondent on the usage of the term that the Respondent "might" have been allowed to institute the premium pay plan under the provision in question or that the provision "arguably" supported the Respondent's interpretation. (Slip Opinion, pp. 4-5) Neither usage was intended to imply that the Respondent had any doubt of

the validity of its position. The qualification was used to encompass an even broader scope than was necessary. The Court of Appeals' view has been developed in the page or two preceding this one and the Respondent's view is made certain here.

The Respondent's right to rely on that language for the plan that was adopted is supported by *any one* of the following approaches to this matter:

1. The language used; in its ordinary meaning, without resort to parole evidence supports the interpretation. The premium rate involved is "over and above the contractual classified wage rate." Thus, the premium is completely discretionary except that it must exceed the agreed upon classified wage rate. The premium is left wholly to the Respondent since it is reserved as a right by the Employer. The purpose of the premium rate is to reward any particular employee for some special fitness, skill, aptitude or the like. The contractual rates paid were $2.29 per hour for the Core Layer, $2.24 per hour for the Core Feeders and $2.15 per hour for the Sheet Turner. The customary lay-up crew consisted of one each of a Core Feeder and Sheet Turner and two Core Layers, one of which actually laid core at any one time while the other worked with the Sheet Turner as the second Sheet Turner. The Core Layers exchanged duties periodically. The skills and responsibilities involved in these various jobs in the usual course of activity were obviously not the same for each was paid a different rate. However, the premium pay plan inaugurated by the Employer provided that all three would be paid at the same rate when a certain norm of production was reached. The ultimate premium was paid only to a

single employee in his pay check. It was not paid to the group and then shared by them. Thus, in the simplest of terms the premium pay was paid to particular employees and certainly satisfied the terms of the premium pay reserved right given the Respondent in this contract. But, if more is needed, the very fact that all were paid the same rate if the required norm was exceeded illustrates the particularity of payment even further. The Respondent's General Manager, who developed this plan, was cognizant of all of the intricacies of work of each member of the lay-up crew. The Respondent was satisfied the degree of added fitness, skill, aptitude or the like was greatest for the Sheet Turner so his reward was greater than the others. On the other hand, the difference between the factors upon which the Core Feeder and Core Layers were paid in their regular rate and that degree of these factors required to attain the norm was less than that required of the Sheet Turner. The differences of those factors required between the Core Layer and the Core Feeder were also reflected.

The fact that the group was required to work together was totally immaterial. Modern technology which employs the production line system, as does the plywood industry and this Employer makes it literally impossible for any employee to be paid a premium without his meshing his fitness, skill, aptitude or the like with those employees responsible for getting the item upon which he works to him and upon taking the item upon which he works away from him. To deny that the portion of the contract here involved covers the plan established by the Respondent is to go a long ways towards nullifying this clause for many jobs

employed in a plywood plant which require comparable treatment to that applied in the instant case.

2. The foregoing illustrates the common sense application of the provision involved in the posture of this case. But if more is needed, we but ask ourselves what does anyone do when he has any doubt of the meaning of terms? The answer is to search out a reputable dictionary, as have the Courts from time to time. Thus, while we do not believe that resort to a dictionary is necessary to support the Respondent's application of the clause, an examination of it demonstrates without equivocation that the application given to the words here by this Respondent reconcile themselves perfectly with standard dictionary usage. A "premium" contemplates "production above a specified amount"; "fitness" includes "the ability to adjust with others, the capability of adaptation or adjustment"; "skill" is the "ability to use one's knowledge effectively and readily in execution or performance; technical expertness; proficiency"; "aptitude" is defined to be "readiness in learning"; "general fitness or suitableness" or the "natural disposition or tendency to a particular action or effect"; and "or the like" includes additional, similar, or the same kind as that referred to initially. The word "particular" "relates to a part or portion of anything" "of or pertaining to a single person, class, or thing; not general; not common."[17]

The pay ultimately rewarded was particular to an employee here as is evidenced by the difference in the amount of the premium involved and in the fact that each employee's pay is separate from all other employees' pay. Thus, the application of the provisions of the contract under con-

[17]All definitions are found in *Webster's New International Dictionary* (2nd ed., Merriam Co., 1955)

sideration by the Respondent also fulfills the dictionary definitions which contemplates the usual and common usages applied to the words of a language.

3. The Opinion suggests that the fact that the premium involved in this matter leveled contractual wage differentials was a factor bringing about the result here. (Slip Opinion, p. 10) This reasoning fails to recognize that (a) the fact that the premium was more than the contractual wage rate is all that is required to establish the existence of a "premium," and (b) by the very nature of the differences that go into the various facets necessary to the satisfactory performance of any job, the force of the factors necessary to rise above satisfactory performance to a premium norm varies from job to job so that if the ultimate premium rate of several jobs develops uniformity it in no way derogates the existence of the "premium" in the first instance. Finally, we simply cannot bring ourselves to believe that the Court meant to say that had the premium rates for each of these employees not leveled the rate paid each when the premium became applicable, the Respondent's plan would have been found acceptable.

4. The Opinion suggests that "the law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained." (Slip Opinion, pp. 9-10) The fact that the negotiators assisting the Respondent and the Union were familiar with comparable language in sister union contracts in the same geographic area illustrates that the language had a known and accepted meaning *to these parties*. The meaning conformed to the interpretation made by the Respondent. Neither party at the time their contract was developed relied upon the "ex-

perience" of the Board. The evidence and testimony concerning other existing plans was introduced into evidence at the hearing in this matter made that evidence probative while nothing within the record of these proceedings supports the "experience" upon which the Board relies.

5. Both parties to the negotiations that culminated in the labor contract here involved were fully aware of the two other premium pay plans which were introduced into the evidence of this matter with considerable specificity. The Respondent did not believe that it would be necessary to go beyond the language of the agreement itself to sustain its position. If it had felt this need, it surely would have developed in evidence other comparable premium pay plans in the same geographic area with sister local unions which were simply alluded to in passing in the evidence at the hearing. (R. 17-18) The note 17 at page 10 of the slip opinion indicates a failure to grasp the full significance of the other plans and their corroboration of the Respondent's interpretation in the case at bar. An analysis of the Mount Lolo Lumber Company plan, for example, bears this out. The contract language of the Mount Lolo premium plan corresponds in essentials to that of the plan at C & C Plywood. Mount Lolo was permitted to pay a higher rate "to reward a *particular* employee for some special fitness, skill, aptitude, or the like." Mount Lolo employed three different car loading crews of two men each. When a given crew exceeded a Company-established production norm, the crew received a premium rate. Some crews qualified, others did not. The premium could only be earned by the combined production effort of the two employees working together in the same crew. The plan

was in existence long before the C & C contract was first negotiated. There have been no complaints about it from the union involved whose representatives are fully aware of it. The Mount Lolo plan was known to and approved by a sister local union to the one representing C & C employees, one of whose representatives is the chief negotiator and one of the business agents of both unions. The great significance of the fact that the joint effort of two men in a crew was daily interpreted and accepted by the union as fully consistent with the language relating to a "particular" employee cannot be overlooked. It is also well to note that the ultimate amount of the premium paid to the two car loaders was the same amount, and resulted in the same pay level, and was thus identical to the premium pay plan which applied to the two Core Layers who periodically exchanged between functions of Core Layer and Sheet Turner at C & C. The plans at the two Companies had a further fundamental similarity in that some crews at both Companies (i.e., glue spreader crews at C & C Plywood, composed of four particular employees, and car loading crews at Mount Lolo, composed of two particular employees), did not qualify for premium pay and were as a consequence paid the contract rate for their jobs. Thus the main features of the two plans and the application given the words of each of these contract clauses are identical.

6. If this decision is to stand, just what has happened to the sanctity of contract? It is fundamental to protect the contract of the parties and to extend to it such reasonable interpretations and effectuations as will encourage and preserve contracts. If this Respondent cannot rely upon

its contract here for what it has done, who will be next to take what appears to be a completely unambiguous contractual provision to the Board to obtain an application of the Board's special "experience" with labor relations? One obvious consequence of this decision will cause employers and unions to bring more and more language specialists to the bargaining table which will simply impede and frustrate the objective of free collective bargaining. No better example can come before this Court than the one here at bar in which it is the contractual interpretation and absolutely nothing else which is the basis for the unfair labor practice finding.

7. The Trial Examiner, who had the opportunity to view the witnesses and form judgments based on the live presentation and not from the cold record, observed:

"General Manager Thomason's decision—so far as the record shows — was consciously reached within the framework of his firm's contract, as he construed it, and did not reflect a deliberate attempt to modify or terminate it. * * *" (R. 92) The Trial Examiner concluded:

> "* * * Though Respondent's management, clearly, refused to concede any lack of propriety or justification with respect to the firm's promulgation of the disputed premium pay plan, spokesmen for the Company made manifest, throughout, their readiness to negotiate regarding the specific terms and conditions under which premium pay would be awarded workers on glue spreader crews. Representatives of the Charging Party, however, made no effort to bargain regarding the plan's content. With matters in their present posture, therefore, Respondent cannot be found in default—upon this ground either—with respect to its statutory obligation to bargain." (R. 93)

It is not reasonable that the Board should be permitted to set aside the findings of the facts of its Trial Examiner and substitute its highly conjectural "experience with labor relations."

V.

This decision suggests that simply because relief might be more speedily obtained from the Board, such a consideration supports the Board's otherwise unwarranted assertion of jurisdiction here. (Slip Opinion, p. 8) Speed of relief is not the test of Board jurisdiction in this or any comparable case. Nothing in the Statute supports the conclusion that the Board is free to interject itself or offer its services based only upon its ability to grant speedy relief.

"Speed of relief" in the resolution of disputes is a characteristic and primary justification for autocracy or despotism. Industrial despotism is not permitted the Board by Congress nor should it be superimposed by this Court on the basis of any such flimsy rationale as the "speed of relief" which is thereby "gained." For the alleged "gain" is no gain at all, but an unretrievable loss of freedom "guaranteed" by Congress in the area of collective bargaining.

Additionally, it is error to believe that the Board does offer speedy relief. Time and again cases can be cited that illustrate that the Board itself engages in inordinate delays. A recent example gained considerable notariety in a situation in which the Board's General Counsel "sat" on a case for a period of fifteen months. (See *Bryant Chucking Grinder Co.*, 160 NLRB No. 125 decided by the Board on October 4, 1966, involving a charge of unfair labor practices filed January 3, 1963. A complaint was not issued until June 5, 1964 after the matter sat on the General

Counsel's desk for 15 months. The elapsed time from filing of charge to decision by the Board was three years and nine months compared to the case at bar requiring three years and five months from filing of charge, through to a decision in this Court. While the Annual Report of the NLRB for fiscal 1966 should be forthcoming shortly we cannot find that it has been issued. However, the Board's Annual Report for fiscal 1965 indicates at p. 11 that the median time consumed from filing charges to the issuance of a complaint was almost two months, specifically 59 days. The Annual Report fails to disclose the median time involved from the date of the issuance of the Complaint to the Trial Examiner's decision or the time involved from the date of that decision to the decision of the Board. Respondent is convinced that if those figures were available it would be much easier to see that speedy justice may be obtained with no less than equal facility by proceeding to court as to the Board.)

VI.

The Court has concerned itself with whether or not the Union had a remedy at law or elsewhere. (Slip Opinion, n. 15, p. 8) The lack of an adequate remedy before another agency or the courts does not vest the Board with authority to act since the Board is the statutory creature of Congress and its authority must be found specifically, not inferentially, in the statute under which it was created and exists. The statute at no point suggests that the Board should have equity jurisdiction or authority to act in the absence of a satisfactory remedy elsewhere.

However, the Union in this matter had available to it any number of adequate remedies for questioning the interpretation taken by the employer, which was the fundamental issue bringing this matter about. These alternates were:

1. It could have proceeded in Federal Court under the provisions of Section 301. The necessity for damages is not a consideration. If the Union was sincere in its disagreement over the interpretation of the agreement and was representing the wishes of the employees it represented at C & C Plywood, the relief of a declaratory judgment would have been adequate. (The reference in the note by which this Court questions whether such a suit would be maintainable is puzzling. Respondent believes such to be the case, but even so that does not vest the Board with jurisdiction.) A total lack of any independent employer unfair labor practices or employer anti-union animus has characterized this case. Thus, it does not follow that the Union's status as bargaining representative was damaged at all.

2. It could have proceeded in State Court claiming a contract violation.

3. It could have sought the intervention of the Federal Mediation and Conciliation Service as indicated in Title II of the Labor Management Relations Act, 1947. This was the means selected by the parties by which "any dispute or grievance" that might "arise under [their] Agreement" was to be settled, if possible, short of a strike. The Union failed and refused to follow this procedure. As a consequence it did not come to the Board in good faith. (See Articles V and VI of the Labor Contract; R. 64-65)

4. It could have sought the assistance of the State of Montana mediation facilities. Either this solution or the solution outlined in the preceding paragraph would have pursued the basic philosophy of free collective bargaining enunciated by Congress where the parties were directed to settle their own disputes in a lasting and satisfactory manner.

5. It could have been urged that this matter be submitted to arbitration on an *ad hoc* basis.

6. It could have pressed its point further in collective bargaining under the grievance procedure. An examination of the record will show that the Union chose simply to insist on the withdrawal of the premium pay plan rather than to discuss the plan itself or to attempt any one of a number of other solutions.

7. It could have awaited the end of the current term of the labor agreement and sought an acceptable revision of the contract.

8. After pursuing the grievance procedure to its end, it could have struck.

The fact that the grievance procedure may ultimately result in economic warfare is not in conflict with the stated intent and purpose of the Congressional policy reflected in the labor legislation of this nation and that fact has been emphasized. Congress considered and rejected a national labor policy based upon compulsory arbitration. Congress recognized the right to strike and chose not to eliminate that ultimate means of resolution of labor problems.

VII.

While rehearing is understandably granted but rarely, the compelling circumstances in this case are myriad. The decision is based upon not one but innumerable erroneous assumptions and premises and imposes a pandora's box filled with potential industrial relations chaos. This decision sets the stage for an unprecedented industrial relations despotism, set within the context of a benign, "impartial" administrative agency which daily stands revealed as the creature of the ebb and flow of political current.

The decision of this Court, in fact, creates a national system of compulsory arbitration in total disregard of the actual will of Congress. This is the essence of this case, if it is not overturned. The Board is given the power to interpret contracts in cases which "may" involve statutory questions. But practically everything within a labor contract involves "statutory" questions. And, there is little to prevent the Board from considering new matters as involving "statutory" questions for it is the Board which is primarily empowered to interpret and administer the Act. The myriad gyrations of the Board, assuming new responsibility and changing precedents and policies at will, has already had an unsettling effect on our industrial society which will be compounded if the decision in this matter is not set aside.

The possibility of an industrial relations despotism which inheres in this decision has a potential of undermining and ultimately destroying the fundamental structure of free collective bargaining in a free society. No free system of

bargaining can endure which relies upon compulsory arbitration. It is not believed that this Court intended to alter the existing industrial relations system in such a radical fashion.

Independently, the Board's substitution of an illusive experience or expertness for evidence in the record is neither due process nor conduct permitted the Board within the purview of its statutory authority. The Board's interpretation placed upon the contract of the parties is so untenable as to be ludicrous.

It is respectfully urged that this matter should be completely and thoroughly re-examined and this decision set aside, reversed and rewritten.

VIII.

This Petition for Rehearing should be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that this petition is presented in good faith and not for delay.

GEORGE J. TICHY

January 31, 1967

SUPREME COURT OF THE UNITED STATES

No. 53.—October Term, 1966.

National Labor Relations Board, Petitioner, *v.* C & C Plywood Corp.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 9, 1967.]

Mr. Justice Stewart delivered the opinion of the Court.

The respondent employer was brought before the National Labor Relations Board to answer a complaint that its inauguration of a premium pay plan during the term of a collective agreement, without prior consultation with the union representing its employees, violated the duties imposed by §§ 8 (a)(5) and (1) of the National Labor Relations Act.[1] The Board issued a cease-and-desist order, rejecting the claim that the respondent's action was authorized by the collective agreement.[2] The Court of Appeals for the Ninth Circuit refused, however, to enforce the Board's order. It reasoned that a provision in the agreement between the union and the employer, which "arguably" allowed the employer to institute the premium pay plan, divested the Board of jurisdiction to entertain the union's unfair labor practice charge. 351 F. 2d 224. We granted certiorari to consider a substantial question of federal labor law. 384 U. S. 903.

In August 1962, the Plywood, Lumber, and Saw Mill Workers Local No. 2405 was certified as the bargaining

[1] National Labor Relations Act, as amended, §§ 8 (a)(5) and (1), 61 Stat. 140–141, 29 U. S. C. §§ 158 (a)(5) & (1) (1964 ed.).

[2] The NLRB's order directed respondent to bargain with the union upon the latter's request and similarly to rescind any payment plan which it had unilaterally instituted.

representative of the respondent's production and maintenance employees. The agreement which resulted from collective bargaining contained the following provision:

"Article XVII

"WAGES

"A. A classified wage scale has been agreed upon by the Employer and Union, and has been signed by the parties and thereby made a part of the written agreement. The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like. The payment of such a premium rate shall not be considered a permanent increase in the rate of that position and may, at the sole option of the Employer, be reduced to the contractual rate . . ."

The agreement also stipulated that wages should be "closed" during the period it was effective[3] and that neither party should be obligated to bargain collectively with respect to any matter not specifically referred to in the contract.[4] Grievance machinery was established, but

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[3] "ARTICLE XVII

". . . .

"B. It is mutually agreed that the attached classified wage scale shall be effective upon the signing of this Working Agreement with wages closed for the term of that agreement. . . ."

[4] "ARTICLE XIX

"WAIVER OF DUTY TO BARGAIN

"The parties acknowledge that during negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer

no ultimate arbitration of grievances or other disputes was provided.

Less than three weeks after this agreement was signed, the respondent posted a notice that all members of the "glue spreader" crews would be paid $2.50 per hour if their crews met specified biweekly (and later weekly) production standards, although under the "classified wage scale" referred to in the above quoted Art. XVII of the agreement, the members of these crews were to be paid hourly wages ranging from $2.15 to $2.29, depending upon their function within the crew.[5] When the union learned of this premium pay plan through one of its members, it immediately asked for a conference with the respondent. During the meetings between the parties which followed this request, the employer indicated a willingness to discuss the terms of the plan, but refused to rescind it pending those discussions.

It was this refusal which prompted the union to charge the respondent with an unfair labor practice in violation of §§ 8 (a)(5) and (1). The trial examiner found that the respondent had instituted the premium-pay program in good-faith reliance upon the right reserved to it in the collective agreement. He, therefore, dismissed the complaint. The Board reversed. Giving consideration to the history of negotiations between the

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and Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agree that the other shall not be obligated to bargain collectively with respect to any subject matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement."

[5] Workers in the three job classifications comprising the glue spreader crews were to receive the following wages:

Core Layer	$2.29/hour
Core Feeder	$2.24/hour
Sheet Turner	$2.15/hour

parties,[*] as well as the express provisions of the collective agreement, the Board ruled the union had not ceded power to the employer unilaterally to change the wage system as it had. For while the agreement specified different hourly pay for different members of the glue spreader crews and allowed for merit increases for "particular employee[s]," the employer had placed all the members of these crews on the same wage scale and had made it a function of the production output of the crew as a whole.

In refusing to enforce the Board's order, the Court of Appeals did not decide that the premium-pay provision of the labor agreement had been misinterpreted by the Board. Instead, it held the Board did not have jurisdiction to find the respondent had violated § 8 (a) of the Labor Act, because the "existence . . . of an unfair labor practice [did] not turn entirely upon the provisions of the Act, but arguably upon a good-faith dispute as to the correct meaning of the provisions of the collective bargaining agreement . . . ." 351 F. 2d, at 228.

The respondent does not question the proposition that an employer may not unilaterally institute merit increases during the term of a collective agreement unless some provision of the contract authorizes him to do so. See *NLRB* v. *J. H. Allison & Co.*, 165 F. 2d 766 (C. A. 6th Cir.), cert. denied, 335 U. S. 814. Cf. *Beacon Piece Dye-*

[*] The trial examiner found that "quite some time prior" to the execution of the contract, the respondent's general manager had proposed an "incentive bonus system" within the department where the glue spreader crews worked. The union's representative, however, declared that the union would not agree to such a plan. Sometime later in the negotiations, the respondent again made reference to the fact that it was "giving thought" to incentive pay, but the trial examiner was unable to conclude that this reference was related to the premium pay provision that eventually appeared in the contract.

ing Co., 121 N. L. R. B. 953 (1958).[7] The argument is, rather, that since the contract contained a provision which *might* have allowed the respondent to institute the wage plan in question, the Board was powerless to determine whether that provision *did* authorize the respondent's action, because the question was one for a state or federal court under § 301 of the Act.[8]

In evaluating this contention, it is important first to point out that the collective bargaining agreement contained no arbitration clause.[9] The contract did provide grievance procedures, but the end result of those procedures, if differences between the parties remained unresolved, was economic warfare, not "the therapy of arbitration." *Carey* v. *Westinghouse Corp.*, 375 U. S. 261, 272. Thus, the Board's action in this case was in no way inconsistent with its previous recognition of arbitration as "an instrument of national labor policy for composing contractual differences." *International Harvester Co.*, 138 N. L. R. B. 923, 926 (1962), aff'd *sub nom.*, *Ramsey* v. *NLRB*, 327 F. 2d 784 (C. A. 7th Cir.), cert. denied, 377 U. S. 1003.[10]

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[7] For illustrations of the limited discretion which the Labor Act allows employers concerning the wages of employees represented by certified unions, see *NLRB* v. *Katz*, 369 U. S. 736; *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217.

[8] § 301, Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185 (1964 ed.).

[9] The Court of Appeals in this case relied upon its previous decision in *Square D Co.* v. *NLRB*, 332 F. 2d 300. But *Square D* involved a collective agreement that provided for arbitration. See Note, Use of an Arbitration Clause, 41 Ind. L. J. 455, 469 (1966).

[10] See also *Cloverleaf Div. of Adams Dairy Co.*, 147 N. L. R. B. 1410, 1416 (1964), where the Board made the following observation to justify, in part, its decision to construe a labor contract in the course of an unfair labor practice proceeding:

". . . it affirmatively appears that neither party has even so much as sought to invoke arbitration. Nor is this a case involving an alleged unfair labor practice, the existence of which turns primarily

The respondent's argument rests primarily upon the legislative history of the 1947 amendments to the National Labor Relations Act. It is said that the rejection by Congress of a bill which would have given the Board unfair labor practice jurisdiction over all breaches of collective bargaining agreements shows that the Board is without power to decide any case involving the interpretation of a labor contract. We do not draw that inference from this legislative history.

When Congress determined that the Board should not have general jurisdiction over all alleged violations of collective bargaining agreements [11] and that such matters should be placed within the jurisdiction of the courts,[12] it was acting upon a principle which this Court had already recognized:

> "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them."

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on an interpretation of specific contractual provisions, unquestionably encompassed by the contract's arbitration provisions, and coming to us in a context that makes it reasonably probable that arbitration settlement of the contract dispute would also put at rest the unfair labor practice controversy in a manner sufficient to effectuate the policies of the Act." (Footnotes omitted.)

Cf. *Spielberg Mfg. Co.*, 112 N. L. R. B. 1080 (1955).

[11] An earlier version of the Senate bill contained the following provision:

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

. . . . . .

"(6) to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration: . . . ."

Section 8 (b) (5) of the same bill imposed a similar limitation upon labor organizations. S. 1126, 80th Cong., 1st Sess., 1 Legis. History of LMRA 109–111, 114. Neither of these provisions was in the bill enacted into law.

[12] § 301, Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185 (1964 ed.).

Terminal Railroad Assn. v. *Brotherhood of Railroad Trainmen*, 318 U. S. 1, 6. To have conferred upon the National Labor Relations Board generalized power to determine the rights of parties under all collective agreements would have been a step toward governmental regulation of the terms of those agreements. We view Congress' decision not to give the Board that broad power as a refusal to take this step.[11]

But in this case the Board has not construed a labor agreement to determine the extent of the contractual rights which were given the union by the employer. It has not imposed its own view of what the terms and conditions of the labor agreement should be. It has done no more than merely enforce a statutory right which Congress considered necessary to allow labor and management to get on with the process of reaching fair terms and conditions of employment—"to provide a means by which agreement may be reached." The Board's interpretation went only so far as was necessary to determine that the union did not agree to give up these statutory safeguards. Thus, the Board, in necessarily construing a labor agreement to decide this unfair labor practice case, has not exceeded the jurisdiction laid out for it by Congress.

This conclusion is re-enforced by previous judicial recognition that a contractual defense does not divest the Labor Board of jurisdiction. For example, in *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, the legality of an employer's refusal to reinstate strikers was based upon

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[11] Congress was also concerned with the possibility of conflicting decisions that would result from placing all questions of contract interpretation before both the Board and the courts. See 93 Cong. Rec. 4153, 2 Legis. History of LMRA 1043 (remarks of Senator Murray); 93 Cong. Rec. 6600, 2 Legis. History of LMRA 1539. But such a possibility does not arise in a case like the present one, since courts have no jurisdiction to enforce the union's statutory rights under §§ 8 (a)(5) and (1).

the Board's construction of a "no strike" clause in the labor agreement, which the employer contended allowed him to refuse to take back workers who had walked out in protest over his unfair labor practice. The strikers applied to the Board for reinstatement and back pay. In giving the requested relief, the Board was forced to construe the scope of the "no strike" clause. This Court, in affirming, stressed that the whole case turned "upon the proper interpretation of the particular contract . . . ." 350 U. S., at 279. Thus, *Mastro Plastics* stands squarely against the respondent's theory as to the Board's lack of power in the present case.[14]

If the Board in a case like this had no jurisdiction to consider a collective agreement prior to an authoritative construction by the courts, labor organizations would face inordinate delays in obtaining vindication of their statutory rights. Where, as here, the parties have not provided for arbitration, the union would have to institute a court action to determine the applicability of the premium pay provision of the collective bargaining agreement.[15] If it succeeded in court, the union would then

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[14] In *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, the employer was charged with a violation of §§ 8 (a) (1), (2) and (3), and not with a failure to bargain. But nothing is suggested that would justify distinguishing the case on that ground.

[15] The precise nature of the union's case in court is not readily apparent. If damages for breach of contract were sought, the union would have difficulty in establishing the amount of injury caused by respondent's action. For the real injury in this case is to the union's status as bargaining representative, and it would be difficult to translate such damage into dollars and cents. If an injunction were sought to vindicate the union's contractual rights, the problem of the applicability of the Norris-LaGuardia Act would have to be faced. A federal injunction issuing from a court with § 301 jurisdiction might be barred by § 7 of that Act. See *International Union of Electrical Workers* v. *General Electric Co.*, 341 F. 2d 571 (C. A. 2d Cir.); *Local No. 861* v. *Stone & Webster Corp.*, 163 F. Supp. 894 (D. C. W. D. La.). Cf. *Sinclair Refining Co.* v. *Atkinson*,

have to go back to the Labor Board to begin an unfair labor practice proceeding. It is not unlikely that this would add years to the already lengthy period required to gain relief from the Board.[18] Congress cannot have intended to place such obstacles in the way of the Board's effective enforcement of statutory duties. For in the labor field, as in few others, time is crucially important in obtaining relief. *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U. S. 511, 526 (dissenting opinion).

The legislative history of the Labor Act, the precedent interpreting it, and the interest of its efficient administration thus all lead to the conclusion that the Board had jurisdiction to deal with the unfair labor practice charge in this case. We hold that the Court of Appeals was in error in deciding to the contrary.

The remaining question, not reached by the Court of Appeals, is whether the Board was wrong in concluding that the contested provision in the collective agreement gave the respondent no unilateral right to institute its premium pay plan. In reaching this conclusion, the Board relied upon its experience with labor relations and the Act's clear emphasis upon the protection of free collective bargaining. We cannot disapprove of the Board's approach. For the law of labor agreements cannot be based upon abstract definitions unrelated to the context

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370 U. S. 195; *Publishers' Assn.* v. *New York Mailers' Union*, 317 F. 2d 624 (C. A. 2d Cir.), cert. granted, 375 U. S. 901, judgment vacated in part for dismissal as moot, 376 U. S. 775. Whether a state injunction might be similarly barred in suits governed by federal labor law, *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95, is an open question. See *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 514, n. 8. Thus, it may be that the only remedy in court which would be available to the union would be a suit for a declaratory judgment, assuming such a suit in these circumstances would be maintainable under state or federal law.

[18] The instant charge, for example, was filed July 31, 1963.

in which the parties bargained and the basic regulatory scheme underlying that context. See Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1 (1958). Nor can we say that the Board was wrong in holding that the union had not foregone its statutory right to bargain about the pay plan inaugurated by the respondent. For the disputed contract provision referred to increases for "particular employee[s]," not groups of workers. And there was nothing in it to suggest that the carefully worked out wage differentials for various members of the glue spreader crew could be invalidated by the respondent's decision to pay all members of the crew the same wage.[17]

The judgment is accordingly reversed and the case is remanded to the Court of Appeals with directions to enforce the Board's order.

Reversed and remanded.

[17] The respondent points to two other labor contracts in its area to support its version of the provision here in question, but those agreements, even if relevant, fall short of substantiating its position. In one, a premium was paid to members of two-man crews who accomplished prescribed production goals. But the respondent does not show that this premium leveled a wage differential set up by the collective bargaining agreement. In the other, a lumber company's head sawyer received an hourly bonus if the plant exceeded a certain monthly output.